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ABANDONMENT OF SUIT.

See PRESCRIPTION, 5.

ACCESSION.

Where a lessee of ground constructs buildings or other works thereon, with his own materials, the owner of the soil may keep them on paying the value of the materials and the price of the workmanship. C. C. 497, 498, 500. The lessee having only the right, at the expiration of the lease, to claim the value of the materials and the price of the workmanship, such buildings or works can neither be alienated nor mortgaged by him. He may alienate his right to claim compensation, or to take the buildings away; but such a right is not susceptible of being mortgaged. So where, by the terms of the lease, any buildings erected by the lessee are to become the property of the lessor at its expiration, without his being bound to pay any compensation therefor, the lessee has only a mere moveable right of possession and enjoyment, incapable of being mortgaged. *Miller* v. *Michoud*, 225.

ACT SOUS SEING PRIVE.

1. As a general rule, an act under private signature has no date as to third persons; but a date may be given to it by facts *dehors* the act, as by proof of the death of the person in whose hand-writing it is shown to have been drawn up, or of a subscribing witness. *Prevost* v. *Ellis*, 56.
2. Proof, by a subscribing witness, that an act of sale of real property *sous seing privé* was signed and executed on the day of its date, is insufficient to give it effect from its date, as to third persons. Parol evidence is admissible only to prove the date of the act, as between the parties. *Ib.*

ADMINISTRATOR.

See SUCCESSIONS.

ADMISSION.

See PLEADING, VII.

AGENT.

1. An agent is responsibie for any damage that may result from his neglect of duty. C. C. 2971, 2972. *Kirkby* v. *Armistead*, 81.
2. One who has managed all the business of a succession, under an agreement by which a third person consented to become the security of the plaintiff as

administratrix, on the condition of her trusting the sole management of the estate to the former, will be allowed the usual commissions of an administrator, as an offset, *pro tanto*, against any claim by the plaintiff for a sum coming to her, as the widow of the deceased, from the succession. *Ball* v. *Hodge*, 396.

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APPEAL.

I. *From what Judgments an Appeal will lie.*
II. *When Appeal may be taken.*
III. *Effect of Appeal in Suspending Execution.*
IV. *Record of Appeal.*
V. *Costs on Appeal.*
VI. *Judgment on Appeal and Damages.*
VII. *Recourse against Surety on Appeal Bond.*

I. *From what Judgments an Appeal will lie.*

1. Where the amount sued for by the plaintiffs is under three hundred dollars, but that claimed by defendant in reconvention exceeds that sum, the reconventional demand will alone be considered on appeal. *Ex parte Goodwin*, 12.
2. The signature of the judge is required only to final judgments. C. P. 546. Other decrees or orders made in the course of a suit, may be entered on the minutes, and, where they may cause irreparable injury, may be appealed from, though not signed. C. P. 544. *Krœutler* v. *Bank of United States*, 160.
3. A garnishee having answered the interrogatories propounded to him, took a rule on plaintiffs to show cause why he should not be allowed to file a supplemental answer. Plaintiffs averring that the answer filed by the garnishee was evasive and insufficent and amounted to a judicial confession in their favor, and cannot be done away with by any subsequent answer, that measures have been taken to fix the liability of the garnishee by obtaining an order directing him to deliver to the sheriff a transfer-warrant for certain shares of stock held by him for the defendants, and that the supplemental answer came too late, moved for a judgment against the garnishee for the amount claimed by them. The supplemental answer was allowed to be filed, and the motion for a judgment against the garnishee overruled, by an order entered on the minutes, but not signed. On appeal by plaintiffs: *Held*, that the appeal must be dismissed, the judgment being an interlocutory one, not producing irreparable injury. *Ib.*
4. No appeal will lie from a judgment on an opposition by a third person, claiming to be paid by preference to the mortgage creditor out of the proceeds of property sold under an order of seizure and sale, where the amount claimed by

the opponent is only three hundred dollars, though the claim for which the order of seizure and sale was issued exceed that amount.

Citizens' Bank of Louisiana v. *Brothers*, 217.

5. An appeal will lie from an interlocutory judgment which may work irreparable injury. *Duplessis* v. *Lastrapes*, 451.

6. Plaintiffs, alleging that a servitude exists on the lands of the defendants, by the terms of the original grant under which they hold, by which the owners are bound to construct and keep in repair forever a certain bridge and road, obtained a judgment, declaring the servitude to exist, and ordering the defendants to keep the bridge and road at all times in repair. There was no allegation in the petition or answer, as to the value of the servitude: nor were any damages claimed or proved. On an appeal by defendants: *Held*, that there being nothing to show that the court has jurisdiction, the appeal must be dismissed. *Police Jury of St. Landry* v. *Fontaine*, 476.

7. No appeal will lie from a judgment refusing a continuance; if improperly refused, the error may be corrected by appeal from the final judgment. C. P. 566. *Gautret* v. *Constant*, 486.

II. *When Appeal may be taken.*

8. A non-resident may appeal at any time within two years from the day on which final judgment was rendered (C. P. 593); and where the plaintiffs allege in their petition and affidavit for an attachment, that the defendants reside out of the State, they will be concluded thereby.

Krœutler v. *Bank of United States*, 213.

III. *Effect of Appeal in Suspending Execution.*

9. The provision of the second section of the act of 3 March, 1819, which declares that no appeal, taken from a judgment in favor of a landlord in an action to recover possession of the premises after the termination of the lease, shall suspend execution, is, as to judgments rendered in such cases by the City Court of New Orleans, virtually repealed by ss. 4, 5 of the act of 10 March, 1838; and a suspensive appeal may be obtained in all such cases, on giving bond, with sufficient surety, for any damage which the appellee may sustain in consequence of the delay occasioned thereby.

State v. *Judge of City Court of New Orleans*, 394.

IV. *Record of Appeal.*

10. Where the clerk of the court from which an appeal has been taken certifies, in his answer to a *certiorari*, that several pages of the note of the evidence, made by the judge to serve as a statement of facts, have been lost, so that the record cannot be completed, the case will be remanded for a new trial.

Evins v. *Murphy*, 477.

11. A case will not be decided on its merits, unless the record contain all the evidence upon which it was tried below; and where it is not the appellant's fault that the record is incomplete, he will be entitled to relief. *Ib.*

12. Where the record of appeal was not filed for more than twelve months after the return day, no application having been made for further time, and it is not pretended that the appellant was prevented from filing it sooner by any event not under his control, the appeal will be dismissed. *Littell* v. *Dolbear*, 485.

V. *Costs on Appeal.*

13. Security for the costs of the clerk of the Supreme Court is not required by any law, but by a rule of court. Under this rule the clerk may refuse to receive the transcript, unless security be given. But if received, without objection on account of want of security, he cannot afterwards consider the transcript as not filed, at least until the appellant has been put in default, by a demand of security. *Rivarde* v. *Palfrey*, 282.

VI. *Judgment on Appeal and Damages.*

14. The Commercial Court of New Orleans has no jurisdiction of petitory or possessory actions. Act of 14 March, 1839, s. 3. But where an exception to its jurisdiction on that ground, has been improperly overruled below, the Supreme Court will examine and decide the case on its merits, under the fourth section of the act of 14th March, 1839, which declares that "no judgment rendered in the Commercial Court shall be void for want of jurisdiction, but in case it be determined that the court had not jurisdiction of the case, the court to which the appeal is taken shall condemn the plaintiff to pay all costs in the court of the first instance, though a judgment may be rendered in the Supreme Court in his favor."

Second Municipality of New Orleans v. *Garland*, 387.

15. Though an appeal be taken by defendant merely for delay, no damages can be allowed unless prayed for by the appellee. *Gradenigo* v. *Hicks*, 481.

VII. *Recourse against Surety on Appeal Bond.*

16. No recourse can be had on the sureties in an appeal bond, until it be clearly shown by the creditor, that the proceeds of the sale of all the estate and effects of the principal have proved insufficient to discharge his demand. So, where a husband appeals from a judgment against him for a community debt, and dies, leaving children and a widow who accepts the community, the sureties on the appeal bond will be liable only in case the judgment is not satisfied by the widow and heirs so far as they are respectively bound for it, and cannot be satisfied by the sale of all their property, real and personal, liable for its payment. *Saulet* v. *Trepagnier*, 266.

ARREST.

A non-resident debtor arrested under the 2d section of the act of 28 March, 1840, having been released on executing a bond, in pursuance of the first section of the amendatory act of the same date, with surety, the condition of which was that he should not depart from the State within three months without leave of the court, on a rule against the bail to show cause why he should not be condemned to pay the amount of the judgment, it was proved that the debtor had left the State within the three months, and that a *fi. fa.* against him had been returned *nulla bona*, but that he was present in court on the trial of the case, and offered to surrender himself in discharge of his bail: *Held*, that the offer to surrender cannot avail the surety, as, since the acts of 1840, no officer had authority to take the principal into custody on such surrendor; and that the departure of the latter from the State, within the three months, and the return of a *fi. fa.* against him unsatisfied, fixed the liability of the surety.

Lindley v. *Hagens*, 204.

ATTACHMENT.

1. The share of a member of a partnership may be seized and sold to satisfy his individual creditors, subject to the debts of the partnership; and such seizure, if legal, operates a dissolution of the partnership. C. C. 2794. But a creditor of one partner cannot seize under execution, or attach any particular thing or piece of property belonging to the partnership, nor any portion of it, to satisfy his debt. The whole share or interest of the indebted partner in the partnership must be seized or attached, when the partnership will be dissolved, and the creditor entitled to satisfaction out of the share of his debtor, after payment of the partnership debts. The interest of a partner is a distinct thing, and must be taken as a whole. *Bank of Tennessee* v. *McKeage*, 130.

2. A creditor of a residuary legatee, or devisee, of one whose succession is being administered in another State, cannot attach specific property of the succession, while still in possession and under the control of the executor, and the estate not yet fully administered. The property must be considered as the executor's, for the purposes of his trust. *Thornhill* v. *Christmas*, 201.

3. Defendants having attached certain bank bonds and notes belonging to plaintiffs, and having recovered judgment in the court below, caused them to be sold under a *fi. fa.* The judgment was reversed on a devolutive appeal. Plaintiffs, in an action for damages for the illegal attachment, having proved that the bonds and notes had fallen in value pending the seizure, and that they were sold for much less than they might have been sold for had no attachment been issued: *Held*, that the defendants should pay the actual damages caused by their attachment. *Horn* v. *Bayard*, 259.

4. A garnishee is but a stakeholder; he has nothing to do, but to take care of himself. He cannot interfere between the plaintiff and defendant, nor others claiming what he holds or owns, but must pay to whomsoever the court may order him. *Hazard* v. *Agricultural Bank of Mississippi*, 326.

5. Where a debt due to defendants by a note secured by mortgage, had been transferred to third persons by a notarial act recorded in the office of the parish judge, but before notice of the transfer was given to the maker of the note, the debt was attached by a creditor of defendants, the attaching creditor will be entitled to be paid by preference out of the proceeds. *Ib.*

6. Debts due to a foreign corporation may be attached. *Ib.*

ATTORNEY AT LAW.

1. The Commercial Court of New Orleans has no jusisdiction of proceedings to cancel the license of an attorney at law. *Chevalon* v. *Schmidt*, 91.

2. The license of an attorney at law cannot be withdrawn or annulled, unless on *conviction* in the manner prescribed by the act of 27 March, 1823. The proceedings must be by information before the District Court of the domicil of the accused; and there must be a trial by jury. Acts 31 March, 1808, s. 6. 27 March, 1823, s. 3. 22 March, 1826, s. 1. *Ib.*

3. A syndic of the creditors of an insolvent, though himself an attorney and counsellor at law, may procure the assistance of counsel in cases in which he needs it. He is a judge of the necessity; and where the value of the servi-

ces is proved, and it is not shown that such assistance was improperly sought, the fees of the counsel must be paid out of the estate surrendered.

Wilcox v. *His Creditors*, 346.

4. A note executed by a married woman, without the authorisation of her husband or of the judge, for the fees of counsel employed by her to institute a suit against her husband for a separation of property, is not binding on her. C. C. 123, 127, 129, 1775, 1779. The order of the judge, authorising her to sue, cannot be considered as empowering her to contract with any one with reference to the suit. But where a suit for separation has been actually brought, the attorneys employed by her may sue, on a *quantum meruit*, for the value of their services. *Crow* v. *Yocom*, 506.

BANK.

I. *Banks generally.*

II. *Union Bank of Louisiana.*

I. *Banks generally.*

1. The powers and the duties of the officers of a bank being defined by its charter and by-laws, they will, when acting within the sphere of their respective duties, represent the corporation, and bind it by their acts; but in other matters they can only represent, or act for, it when authorised by a resolution of the board of directors. *Reed* v. *Powell*, 98.

2. A cashier of a bank has no authority, by virtue of his office, to represent the bank at a meeting of the creditors of an insolvent, and to vote for a syndic. A resolution of the board of directors can alone empower him to do so. But a ratification by the directors of the acts of a cashier who had voted at a meeting of creditors without authority, made after the proceedings before the notary were closed and the ten days had expired after which the rights of the parties claiming the syndicship became fixed, cannot affect rights previously acquired. C. C. 1789, 2252. Act 20 February, 1817. *Ib.*

3. The managers of a bank appointed under the provisions of the 29th section of the act of 14 March, 1842, providing for the liquidation of banks, may be sued for any cause of action, though arising under the administration of former boards of directors. *Gaillard* v. *Citizens Bank of Louisiana*, 168.

4. Though a bank has been put in liquidation under the 29th section of the act of 14 March, 1842, and an order has been made staying all proceedings against it, a creditor may sue the bank in the court before which the proceedings for liquidation are pending, where he only prays for a judgment recognising his claim, and ordering it to be paid in course of administration. *Ib.*

5. Action by a bank, in liquidation under the acts of 14 and 26 March, 1842, to recover the amount of a dividend due on stock held by it in another corporation, to which it was indebted in a larger sum for money on deposit: *Held*, that the claim of the bank was discharged by compensation. Act 5 April, 1843, s. 2.

Citizens' Bank of Louisiana v. *Levée Steam Cotton Press Company*, 286.

II. *Union Bank of Louisiana.*

6. Under the 24th section of the act of 3 April, 1832, incorporating the Union

Bank of Louisiana, the right of the bank to seize and sell property mortgaged to it for stock or loans, is not impaired by the death of the mortgagor; and the bank may proceed to enforce the sale of the property *via executiva*, where it has a title importing a confession of judgment, or *via ordinaria* by obtaining a judgment against the representatives of the mortgagor (C. P. 61, 63, 64,) when it has no such title, and these proceedings, to avoid the delays and formalities from which it was the intention of the legislature to relieve the bank, must necessarily be before the ordinary tribunals, as a Court of Probates can issue no order of seizure and sale, nor *fi. fa.*, and can only order the sale of the property and payment of the debt in due course of administration. C. P. 986, 987, 990, 991, 993. The words "*according to law*," in the 24th section, refer to the seizure and sale authorised by that section, and mean that all the requirements of the law as to notice, appraisement, advertisement, &c. must be complied with—not that payment must be sought in the Probate Court, concurrently with the other creditors of the deceased. If the proceeds of the sale of the mortgaged property should not pay the whole claim, the bank must go into the Court of Probates for the balance, and, if the claim should not be admitted, sue the representatives of the deceased in that court; and this, whether the original proceedings were *via executiva* or *via ordinaria*.

BANKRUPT.

1. A bankrupt, discharged by a District Court of the United States under the act of 1841, has a right to have the mortgages, recorded against him for the purpose of securing debts from which he has been discharged, erased, so far as they may effect his future property. And where a rule has been taken in the District Court on the recorder and the mortgagees, to show cause why the mortgages should not be erased, and no cause has been shown, and the rule has been made absolute, and the recorder refuses to make the erasure, a mandamus may be obtained from a state court to compel him to do so. *Per Curiam:* As the debts secured by the mortgages cannot be recovered but in the event of the certificate being annulled for fraud, it is unjust, in the absence of any such charge, that the mortgages should stand recorded as operating on the future property of the bankrupt. *Diggs* v. *Prieur*, 54.
2. A wife having obtained a judgment of separation of property, levied a *fi. fa.* on the property of the husband, who subsequently applied for the benefit of the bankrupt act of Congress, of 19th August, 1841, and was discharged. The wife's execution not having been satisfied in full: *Held*, that the balance of the debt due by the husband, was extinguished by his discharge.

Alling v. *Egan*, 244.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. *Power to draw or endorse in the name of another.*
II. *Presentment for payment, Protest and Notice.*
III. *Release of a Party.*
IV. *Evidence in Actions on Bills and Notes.*
V. *Defence to Actions on Bills and Notes.*

I. *Power to draw or endorse in the name of another.*

1. After the dissolution of a partnership, no one of the partners can use the social name so as to bind the rest. To draw or endorse a note in the name of the partnership, the authority must be express and special.

Carr v. *Woods*, 95.

II. *Presentment for payment, Protest and Notice.*

2. It is not indispensable that demand of payment of a note or bill should be made, and notice of non-payment given, by a notary. *Follain* v. *Dupré*, 454.

3. The acts of 14 March, 1823, and 13 March, 1827, authorising notaries, parish judges, and, in some cases, justices of the peace, to protest and give notice of the protest of bills and notes, have introduced no new rule as to demand of payment, or the diligence to be used in giving notice of protest. They merely introduced a new mode of proof, unknown to the commercial law. *Ib.*

4. A presentment of a bill or note for payment, and notice of non-payment given by an agent of the holder, or by any person lawfully in possession for the purpose of demanding payment, is sufficient. *Ib.*

5. A notary to whom an inland bill had been given to demand payment, testified, that he called on the day of payment, during the usual business hours, at plaintiff's counting-house, which was named, on the face of the bill, as the place of payment, but found no one there, and that he waited a short time without seeing any one of whom he could make a demand; that he afterwards sent his clerk to make a demand, who returned the note to him unpaid; and that one of the plaintiffs soon after came to the notary's office, where he demanded payment of him, and was informed that the bill could not be paid: *Held*, that the demand made of one of the plaintiffs at the notary's office, and his answer, show that the note would not have been paid though he had waited longer, or some one been present when he called at the place of payment; that no injury resulted to the endorser; and that the demand was sufficient. *Ib.*

6. A demand of payment of an inland bill, made by the clerk of a notary to whom the bill had been given for the purpose of making a demand and giving notice in case of dishonor, is sufficient. The notary had a right to appoint a substitute, for whose acts he was answerable; and where, in such a case, the notices of non-payment were made out by the notary, and deposited in the post office by the clerk, the notice will be good. *Ib.*

7. The provisions of the statute of 13 March, 1827, requiring notice of protest to be sent to an endorser at his usual residence or domicil, are the same as those of the commercial law. The domicil of a citizen being, according to art. 42 of the Civil Code, the parish in which he habitually resides and has his principal establishment, notice must be directed to him there, or sent to some post office within the parish, unless there be a post office nearer to his actual residence in an adjoining parish or State, in which case it may be directed to the latter, the domicil of the endorser being mentioned. *Ib.*

8. The rule of the commercial law, that a notice of protest must be sent to the post office nearest to the actual residence of the endorser, and that the holder must use due diligence to discover his domicil and the nearest post office, is, so far as it requires that the notice shall be sent to the nearest post office, sub-

ject to many exceptions, one of which is where the party to be notified is in the habit of receiving his letters at a more distant office, or by a more circuitous route, and that fact be known. The great object of the law is to give notice in as speedy and convenient manner as it can be done; and when there is a reasonable compliance with this rule it is sufficient. *Ib.*

9. It is not absolutely necessary that a notice of protest should be directed to an endorser at the post office nearest to his residence, where he receives his letters and papers from two offices, and the difference in their distance from his residence is but little. In such a case, a notice directed to either will be good. *Ib.*

10. In an action against the endorser of a bill, it was proved that he was in the habit of receiving his letters from two post offices, both of which were in the parish of his domicil, but one about a mile nearer to his residence than the other; that, supposing him to apply at the two offices every mail day, he would receive letters, if sent to him through the farthest office, from ten to eighteen hours sooner than if directed to the nearest; and that he had instructed the postmaster at the farthest office to retain all letters which might come to his office for him: *Held*, that a notice of protest directed to the endorser at the farthest office was sufficient. *Ib.*

11. Where it is proved that defendant had declared "that his residence is the parish of S——," and that, by the laws and regulations of the post office department, all letters directed to that parish, without specifying any particular office, are sent to a post office from which he was in the habit of receiving his letters, a notice of protest directed to him, as the endorser of a bill, at that parish, will be sufficient. *Ib.*

III. *Release of a Party.*

12. Where the holder of a note, in consideration of a partial payment by the drawer, grants him an extension of time for the balance, without the consent of the accommodation endorser, the latter will be discharged. C. C. 3032.

Freeman v. *Profilet*, 33.

IV. *Evidence in Actions on Bills and Notes.*

13. In an action against the endorser of a note, the signature of the maker need not be proved. *Young* v. *Patterson*, 7.

14. In an action against the endorser of a note, the notary who had protested it certified, that he had left notices of the protest at the counting-house of defendant, in a letter addressed to him, handed to a clerk of competent age, there employed. A witness introduced by defendant swore, that he was the only clerk of the latter at the maturity of the note, and that he never received any notice of protest. *Per Curiam:* This does not destroy the effect of the notary's certificate. The notice was enclosed in a letter, which it must be presumed was sealed, and the witness thus prevented from knowing its contents. *Ib.*

15. The evidence of a witness who states that he verily believes that notice of the neglect or refusal of the acceptor to pay a bill at maturity was given to the drawer, but does not say how it was given, nor assign any reason for his

belief, nor state any facts from which the court may judge of the sufficiency of the notice, is not sufficient proof of notice.

Kræutler v. *Bank of United States*, 213.

16. Where a plaintiff relies on the protest and certificate of a notary, under the act of 13 March, 1827, to prove a demand of payment and notice of protest, parol evidence is inadmissible to explain, contradict, or add to the written evidence; nor can a portion of such evidence be used to make out one part of the case, and the testimony of the notary, as to any thing required by law to be inserted in such acts, to make out another part. As to any other facts, the notary is competent. But a plaintiff may offer the protest and certificate in evidence, and the parol testimony of the notary to prove a demand and notice, with the view, in case the protest and certificate should be insufficient under the statute, to rely on the parol evidence alone. If the protest and certificate be imperfect and insufficient under the statute, they are not the best evidence, and, consequently, parol testimony cannot be excluded as secondary.

Follain v. *Dupré*, 454.

17. The notary by whom a protest was made and notice given of the protest of a note or bill, is a competent witness to prove the protest and notice. He is not disqualified by his liability for neglect or mistakes in the discharge of his official duties. *Ib.*

18. A protest by a notary of a domestic bill or promissory note for non-acceptance or non-payment, and his certificate of notice to the endorser, are inadmissible under the general commercial law. They are only received where there is a statute or local law authorising their admission. By the act of the legislature of this State, of 13 March, 1827, a notary is authorised to do what the holder of the bill or note is required, under the commercial law, to do himself, and to certify the facts officially; but the mode of proof authorised by the statute is not exclusive. *Ib.*

19. In an action against the endorsers of a note, the notary's certificate, offered in evidence, recited that he had notified the protest "à MM. H. D. et F., *aux Opelousas, endosseurs du billet, au moyen de six notices écrites adressées auxdits* H. D. *et* F., *respectivement; trois desquelles, adressées comme dit est, j'ai mises à la poste à V.*," etc. *Held*, that the certificate must be construed to mean that three of the notices of protest were deposited in the post office at V., addressed to the endorsers at Opelousas; and that the proof of notice is sufficient.

Union Bank of Louisiana v. *Daniel*, 480.

20. Where the protest of a notary is offered in evidence to prove a demand of payment of the makers of a note, it must appear from the protest itself that the notary had the note in his possession, and demanded payment at the proper place and from the proper party. The answer of the party of whom the demand was made, must also appear in the protest. *Dupré* v. *Richard*, 495.

See 3 *supra.*

V. *Defence to Actions on Bills and Notes.*

21. Fraud in obtaining an endorsement, is no defence to an action against the endorser, by one to whom the note had been transferred in the usual course

of business, for a good consideration, without notice, unless fraud or collusion can be proved as to him. *Follain* v. *Dupré*, 454.

22. Action against the endorser of a note, signed, after the dissolution of the firm, by one of the partners, without authority from the others, in the social name. It was proved that the note was executed at the request of the endorser; that he knew that the partnership was dissolved at the time; and that the note was given for the purpose of renewing one previously endorsed by him for the benefit of the partnership: *Held*, that the fact that the partner who made the note had no authority to bind the partnership, does not discharge the endorser, the partner who signed the social name having, at least, bound himself; that every endorsement, accommodation or otherwise, is essentially an original contract, equivalent to a new note or bill, in favor of the holder, on the acceptor or obligor; and that a *bona fide* holder or endorsee may exercise his recourse against his endorser, without regard to previous parties to the note or bill, unless privity is shown between the endorsee and drawer, as to some fraud or illegality which the endorser may set up as a defence. *Dupré* v. *Richard*, 497.

23. An order written by the maker on the back of a promissory note, while in the hands of an endorsee to whom it had been transferred after maturity, requesting a third person to pay the note on a day named, is a mere indication by the debtor of a person who is to pay in his place, and does not operate a novation of the debt. On the failure of the person indicated to pay, the maker will be responsible. C. C. 2188, 2190. *Muggah* v. *Rogers*, 511.

CARRIERS.

See Letting and Hiring, 6, 7.

CLINTON AND PORT HUDSON RAILROAD COMPANY.

1. By an act of 28 March, 1839, for expediting the construction of the Clinton and Port Hudson Railroad, it was provided (sec. 2,) that certain bonds of the State should be loaned to the company, on condition that it should agree, "in case said bonds, and the interest thereon, are not punctually paid according to the provisions of this act, that the railroad constructed by the company shall, by the mere failure to pay said bonds (or either of them, s. 4,) and the interest thereon, and the payment thereof by the State, become the property of the State." An act of 8 March, 1841, after reciting that the bonds so loaned had been sold by the company, and that a portion of the first instalment of interest on said bonds is due and unpaid, and that the company is unable to pay the same, directs (s. 1,) the treasurer of the State to pay the interest so due; and declares, (s. 2,) "by virtue of the second and fourth sections of the act of 1839, the said road, with all the machinery, fixtures, slaves and appurtenances thereunto belonging or appertaining, to be forfeited to the State." *Held*, that so much of the act of 8 March, 1841, as declares the road, with the machinery, fixtures and slaves, forfeited to the State, is unconstitutional, and confers no right whatever on the State; and that the question whether there has been a forfeiture or not, is one for judicial enquiry and decision.

Perry v. *Commissioners of Clinton and Port Hudson Railroad Company*, 412.

2. The powers and duties of the commissioners appointed by the Governor to

liquidate the affairs of the Clinton and Port Hudson Railroad Company, under the act of 26 March, 1842, ch. 159, are defined by the second section of the act, which declares that the liquidation of its affairs shall be conducted according to the provisions of the act, "to provide for the liquidation of banks," of 14 March 1842, ch. 98. *Ib.*

3. So much of the sixth section of the act of 25 March, 1844, ch. 83, as directs the treasurer of the State to sell the property, privileges and immunities of the Clinton and Port Hudson Railroad Company, was enacted under the erroneous impression that the property and privileges of the Company were legally vested, by forfeiture, in the State. The legislature had no power to direct the sale of the property. *Ib.*

CODES, ARTICLES OF, CITED, EXPOUNDED, &c.

I. *Code of* 1808.
II. *Civil Code.*
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I. *Code of* 1808.

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——— 3, art. 12. Usufruct. *Ibid.*
——III, tit. 1, art. 59. Successions. *Beale* v. *Walden*, 67.
——— 2, art. 50. Donations *inter vivos*. *Lagrange* v. *Barré*, 302.
——— 5, arts. 50, 62, 64. Husband and Wife. *Gonor* v. *Her Husband*, 526.
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COMPENSATION.

1. Action by a bank, in liquidation under the acts of 14 and 26 March 1842, to recover the amount of a dividend due on stock held by it in another corporation, to which it was indebted in a large sum for money on deposit: *Held*, that the claim of the bank was discharged by compensation. Act 5 April, 1843, s. 2. *Citizens Bank of Louisiana* v. *Levée Steam Cotton Press Company*, 286.
2. A plea of compensation is in the nature of a demand, and should be accompanied with a specification of the particular amount expected to be compensated, of the manner in which the party who claims the benefit of it acquired a right thereto, and with every circumstance of time and place which ought to be given in other demands. *Wilcox* v. *His Creditors*, 346.

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CONSTITUTION OF LOUISIANA.

Art. 4, sect. 2. Jurisdiction of Supreme Court. *State* v. *Parish Judge of Plaquemines*, 285.
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CONSOLIDATION OF ACTIONS.

The defendant in an action for an amount claimed for drayage, having previously sued plaintiff, in another court, for a sum alleged to be due to him also for drayage, it was agreed between the parties that the latter suit should be transferred to the court in which the first was pending, to be tried immediately after the first suit. The two suits were ordered by the court to be consolidated and tried together. *Held*, that, when the suit was filed in the court to which it was transferred, it became a part of its records, and was under its control in the same manner as if it had originated there, and that the two actions were properly consolidated. *McGawley* v. *Gannon*, 164.

CONTRACTS.

1. A resolutory condition is implied in all commutative contracts, to take effect in case either party fails to comply with his engagements. C. C. 2041. *Stevens* v. *Fisk*, 18.
2. A stockholder in an insolvent company, a part of whose subscription is unpaid, cannot, by a donation to an insolvent individual, made to get rid of his liability for such unpaid stock, avoid responsibility as a stockholder. A creditor, having a *fieri facias* against the company, may proceed against him in the manner pointed out by the 13th section of the act 20 March, 1839, and, on proving that the donation was not real, recover judgment for any balance due on the stock. *Mandion* v. *Firemen's Insurance Company of New Orleans*, 177.
3. Where stock, on which a balance was still due on account of the original subscription, was transferred to a third person merely to secure a loan, and, on payment of the loan, was re-transferred, such third person will not be liable

to creditors of the company for any balance due on the shares, where the transfer, though an absolute one on its face, was not signed and accepted so as to preclude him from showing that it was intended only as a security.

Mandion v. *Firemen's Insurance Company of New Orleans*, 178.

4. The property of a debtor being the common pledge of his creditors, every act done by him with intent to deprive them of their eventual rights upon it, is illegal. C. C. 1963, 1964. *Barker* v. *Phillips*, 190.

5. The creditors of one who had commenced an action against a succession, claiming to have been the husband of the deceased, and to be entitled, as such, to one half of the property in her possession at the time of her death as community property, may intervene and prosecute the claim, where they apprehend that the plaintiff is about to abandon it for the purpose of defrauding them. C. C. 1985. *Succession of Baum*, 314.

6. Plaintiff having commenced an action against a succession to cause himself to be acknowledged as the husband of the deceased, neglected for more than three years to take any steps in it, when certain creditors intervened, praying to be allowed to prosecute the action on the ground that the plaintiff was about to abandon it for the purpose of defrauding them. The latter subsequently attempted to discontinue, but his motion was overruled. *Held*, that the prescription of one year established by art. 1989 of the Civil Code is inapplicable to the claim of the intervenors, who do not seek to revoke any contract or act of any kind, but simply to intervene in an action for the protection of their rights. *Ib.*

7. Where a partner in a particular partnership, entitled to an undivided third of certain immovable property, permits his copartner to mortgage the whole for the payment of an individual debt of the latter, he may be estopped from disputing the mortgage; but such permission will not amount to a renunciation of his title, nor to an acknowledgement of the mortgagor's title to the whole of the property. *Thomson* v. *Mylne*, 349.

8. Where a defendant consented to become surety for the plaintiff as administratrix of her husband's succession, on condition that she would leave the whole management of the estate to his co-defendant, he will be responsible, *in solido* with the latter, for any amount that may be due from him to the plaintiff, for her share in the community of *acquets*. *Ball* v. *Hodge*. 390.

9. Where one sues for the possession of a house, built on his land for him by defendant, which the latter refuses to surrender, or for the value of the property, with damages for its detention, judgment should not be rendered condemning defendant absolutely to pay the value of the house, thereby rendering him the owner of the building. The judgment should be in favor of plaintiff for the possession of the house, with damages for its detention.

Bateman v. *Dazy*, 484.

10. Defendant promised, in writing, to pay to plaintiff, on a day fixed, a certain sum, in molasses at the market price. It was proved that, a few weeks before the time of payment, defendant wrote to plaintiff, requesting him to send, as soon as possible, casks in which to receive the molasses, as defendant apprehended that the cistern which contained his molasses would burst. Plaintiff did not send for the molasses, and, a few days after the debt was payable, defendant's

cistern bursted, and the molasses was lost. In an action against defendant for the amount so promised: *Held*, that admitting plaintiff was bound to furnish the casks, a mere notice to send them, without specifying any time at which the delivery was proposed to be made, is not a sufficient tender to place the molasses at his risk. Judgment for plaintiff for the amount claimed, payable in molasses, at the market price, at the time of payment. *Smith* v. *Richardson*, 516.

CORONER.

The office of Coroner is held for a term of four years. Act 1 March, 1827, s. 1. *Cruzat* v. *Davis*, 264.

COSTS.

1. Law charges are the costs incurred in court in the prosecution of a suit, to be paid by the party cast. Such costs, when taxed according to law, are privileged against the insolvent's estate, whether incurred previously to the insolvency, or in the *concurso*. C. C. 3162, 3163. *Barkley* v. *His Creditors*, 28.
2. The costs of the proceedings, incurred in establishing a charge of fraud against an insolvent, are included among the law charges privileged against the estate. *Ib.*
3. Security for the costs of the clerk of the Supreme Court is not required by any law, but by a rule of court. Under this rule the clerk may refuse to receive the transcript, unless security be given. But if received, without objection on account of want of security, he cannot afterwards consider the transcript as not filed, at least until the appellant has been put in default, by a demand of security. *Rivarde* v. *Palfrey*, 282.

See COURTS, 11.

COURTS.

I. *Courts generally.*
II. *Supreme Court.*
III. *District and Probate Courts.*
IV. *Commercial Court of New Orleans.*
V. *City Court of New Orleans.*

I. *Courts generally.*

1. The law designates who the original sequestrator shall be, and the court cannot appoint another, unless by consent of parties. The parties to an action may select their own agents, and confer on them such powers as they think proper; but the court can impose no burdens or restrictions on such agents, not imposed by their principals. *United States* v. *Bank of United States*, 418.

II. *Supreme Court.*

2. The jurisdiction of the Supreme Court being appellate only and limited by the Constitution (art. 4, § 2) to civil cases in which the matter in dispute exceeds three hundred dollars, it cannot issue a *mandamus* to an inferior tribunal where the amount in dispute is under that sum. A *mandamus* can be issued by the Supreme Court only in aid of its appellate jurisdiction. C. P. 829, 839. *State* v. *Parish Judge of Plaquemines*, 285.

3. A single decision, particularly where the point in controversy does not appear to have been thoroughly investigated, is insufficient to settle the jurisprudence of the country. *Lagrange* v. *Barré*, 302.

III. *District and Probate Courts.*

4. The provision of the Code of 1808 (book 3, title 1, art. 59), that the place where the party died is that in which his succession shall be considered to be opened, having been repealed by the Code of 1825, which declares (art. 929) that the succession shall be considered as opened in the parish in which the deceased resided, if he had a fixed domicil within the State: *Held*, that the death of the party must be considered as irrevocably vesting the jurisdiction, and that, if the death occurred while the old law was yet in force, the jurisdiction must be determined by it, though no proceedings were had before the promulgation of the new law; but that where a parish has been divided since the death, the jurisdiction will depend upon the fact of the court of the original parish having taken any steps, or assumed jurisdiction in relation to the *mortuaria*, before the division; it it has, its jurisdiction will not be divested by the division; otherwise jurisdiction will belong, under art. 929 of the Civil Code, to the court of the parish which embraces the residence of the deceased. *Beale* v. *Walden*, 67.

5. The plaintiff in an action before a District Court assigned his claim therein to several creditors, notifying the defendants; other of his creditors, having obtained judgments against him, levied their executions, in the hands of the defendants, on his interest in the suit. Defendant having died pending the suit, his executors took a rule in the District Court on the assignees and seizing creditors to determine their respective ranks, and for the purpose of distributing among them the amount of the judgment which had been rendered in favor of the plaintiff, which they deposited with the clerk of the District Court: *Held*, that the amount so deposited is a debt in money due by the succession of the defendant to the assignees or seizing creditors; that the Probate Court, in which the succession of the defendant was opened, has exclusive jurisdiction to determine their rights and privileges on the sums due by the estate of the deceased (C. P. 924 § 13, 983); and that the assignees or seizing creditors, though they may have submitted below to the jurisdiction of the District Court, may demand, on appeal, the nullity of the judgment of the latter, on the ground of want of jurisdiction. C. P. 606 § 3, 608. The consent of parties cannot give jurisdiction, when wanting *ratione materiæ*. It can only confer it, where mere personal rights are involved; or where a defendant is sued before another judge than the one of his domicil, and he nevertheless pleads to the merits. C. P. 93. *Fleming* v. *Hiligsberg*, 77.

6. District Courts have jurisdiction of an action to annul the legacies in a will, instituted by persons claiming to be heirs of the deceased, against the legatees in possession. *Dunn* v. *Kenney*, 249.

7. A District Court has jurisdiction of an action by the executor of a deceased partner against the survivor, for a settlement of the partnership accounts. *Thomson* v. *Mylne*, 349.

8. The jurisdiction of District Courts extends to the liquidation of claims against

successions when pleaded in compensation or reconvention, so far as the conflicting claims extinguish each other; but for any balance ascertained to be due to the defendant he must resort to the court in which the succession was opened, that his rank may be ascertained contradictorily with the other creditors, and his claim placed in its proper place on the *tableau* of distribution. *Ib.*

IV. *Commercial Court of New Orleans.*

9. An action before the Commercial Court to annul a sale made by the sheriff of a District Court, and exception that the former court cannot annul, or set aside the proceedings of the latter: *Held*, that so far as the judicial proceedings of the latter are concerned, the Commercial Court is without jurisdiction; but but where the executory proceedings of a sheriff are set up by defendants as the basis of their title, they may be examined, and set aside if illegal.

Mississippi Marine and Fire Insurance Company v. *Bank of Louisiana*, 47.

10. The Commercial Court of New Orleans has no jurisdiction of proceedings to cancel the license of an attorney at law. *Chevalon* v. *Schmidt*, 91.

11. The Commercial Court of New Orleans has no jurisdiction of petitory or possessory actions. Act of 14 March, 1839, s. 3. But where an exception to its jurisdiction on that ground, has been improperly overruled below, the Supreme Court will examine and decide the case on its merits, under the fourth section of the act of 14 March, 1839, which declares that "no judgment rendered in the Commercial Court shall be void for want of jurisdiction, but in case it be determined that the court had not jurisdiction of the case, the court to which the appeal is taken shall condemn the plaintiff to pay all costs in the court of the first instance, though a judgment may be rendered in the Supreme Court in his favor." *Second Municipality of New Orleans* v. *Garland*, 387.

V. *City Court of New Orleans.*

12. The provision of the second section of the act of 3 March, 1819, which declares that no appeal, taken from a judgment in favor of a landlord in an action to recover possession of the premises after the termination of the lease, shall suspend execution, is, as to judgments rendered in such cases by the City Court of New Orleans, virtually repealed by ss. 4, 5 of the act of 10 March, 1838; and a suspensive appeal may be obtained in all such cases, on giving bond, with sufficient surety, for any damage which the appellee may sustain in consequence of the delay occasioned thereby.

State v. *Judge of City Court of New Orleans*, 394.

DISCONTINUANCE.

13. Where the rights of a plaintiff in an action against a succession have been seized under a *fi. fa.*, he cannot discontinue. *Succession of Baum*, 314.

See PRESCRIPTION 5.

DONATIONS INTER VIVOS.

1. A condition inserted in an act of donation *inter vivos* of all the donor's property, that the donee shall, without charge, supply the donor during his life with clothes and food, and, in case of sickness, with medical attendance, and shall bestow on him all the care which children would bestow on a parent,

cannot be considered as a reservation of enough of the donor's property for his subsistence, within the meaning of art. 1484 of the Civil Code. Such a donation is null for the whole. *Per Curiam:* The donor must keep in his own possession and ownership enough of his property for his subsistence. The mere promise of the donee to support the donor is insufficient. C. C. 1520, 1547. *Lagrangé* v. *Barré*, 302.

2. Where the value of the object given exceeds by one-half that of the charges, or services, imposed on the donee, the donation be considered as an onerous one, to which, under art. 1513 of the Civil Code, the rules peculiar to donations *inter vivos* do not apply. *Ib.*

3. Excessive or inofficious donations—actions for the reduction of which are prescribed by five years, where the person entitled to exercise them is in the State, and by ten years if out of it, under art. 3507 of the Civil Code, are those dispositions which fathers and mothers, or other ascendants, make of their property to the prejudice of their descendants, beyond the proportion reserved to them by law. C. C. 3522, s. 21. *Ib.*

4. An action to annul a donatiou *inter vivos*, in consequence of the donor's not having reserved property enough for his subsistence, is not prescribed by five years. From considerations of public order, such a donation is declared, by art. 1484 of the Civil Code, to be absolutely null. *Ib.*

5. A donation of a slave made to a concubine, was not illegal under the Code of 1808. Book 3, tit. 2, art. 10. *Sandoz* v. *Gary*, 529.

ERROR.

1. Plaintiff having purchased a slave from a third person, transferred to the latter in payment of the price part of a twelve-month's bond. In taking out execution on the bond, plaintiff's attorney, by mistake, ordered the clerk to credit the execution with the amount of the part of the bond so transferred. The balance due on the bond having been collected by the sheriff, the transferree claimed to be paid the amount transferred to him out of the sum in the hands of the sheriff, in preference to the plaintiff: *Held*, that the transferree cannot be prejudiced by the mistake of the plaintiff's attorney, and is entitled to the amount claimed. *Garrett* v. *Morgan*, 447.

2. Money paid through error, the debt having been previously satisfied, may be recovered back. C. C. 2129, 2280. *Beasley* v. *Allen*, 502.

EVIDENCE.

I. *Onus Probandi.*

II. *Presumption.*

III. *Interest of Witness.*

IV. *Examination of Witness.*

V. *Commission to take Testimony.*

VI. *Admissibility and Sufficiency of Evidence under the Pleadings.*

VII. *Judicial Records and Proceedings, and Copies thereof.*

VIII. *Non-judicial Records, and Copies thereof.*
IX. *Inadmissibility of Parol Evidence under art. 2256 of the Civil Code.*
X. *Admissibility of Parol Evidence to establish Date of an act Sous Seing Privé.*
XI. *Proof of Fraud.*
XII. *Proof of Marriage.*
XIII. *Secondary Evidence.*
XIV. *Irrelevant Evidence.*
XV. *Evidence of Particular Persons.*
1. *Parties.*
2. *Notaries.*
XVI. *Evidence in Particular Actions.*
1. *In Actions on Bills of Exchange and Promissory Notes.*
2. *In Petitory Actions.*

I. *Onus Probandi.*

1. Damages cannot be recovered for the temporary detention of a note, where the only evidence that plaintiff sustained any damage, is the testimony of two witnesses, who swear that, in their opinion, she sustained damage to a certain amount, and neither states any fact upon which his opinion is based.

Liles v. *New Orleans Canal and Banking Company*, 92.

2. Action by a collector of the customs at New Orleans who had been removed, to recover from his successor one half of the commission of one per cent allowed to the collector on the amount of certain bonds for duties on imports, the bonds having been taken by the plaintiff, but their amounts paid to his successor, to whom the whole commission was allowed on settlement of his accounts with the treasury: *Held*, that the act of Congress of 7 May, 1822, sec. 9, having declared that whenever the emoluments of the collector of the customs at New Orleans, and certain other ports, shall exceed a fixed sum, after deducting the expenses of the office, the excess shall be paid into the treasury, plaintiff must show that he has not received the *maximum* allowed by law, before he can maintain an action. *Prieur* v. *Morgan*, 292.

3. Payments to the creditors of a succession, made without an order from the Court of Probates, are irregular; but when they exonerate the estate from legal charges, and thereby benefit the heirs, the latter must show that such charges are unjust, unfounded, or excessive, or the payments will be allowed to the party by whom they were made. *Rouly* v. *Bérard*, 478.

See 32, 41, *infra.*

II. *Presumption.*

4. All the effects or property in the possession of the spouses, or either, at the time of the dissolution of the community by death, are presumed to belong to the community. C. C. 2374. *Succession of Baum*, 314.

5. Where one claiming under a *fi. fa.* produces the judgment, execution, sheriff's

return thereon, and act of sale, it will be presumed that the formalities of the law have been complied with. It is for the other party to show that they have not been complied with. *Succession of Baum*, 314.

6. Persons of color are presumed to be free. *Per Curiam:* Slavery is an exception to the condition of the great mass of mankind, and, except as to Africans in the slaveholding States, the presumption is in favor of freedom, and the burden proof is on him who claims the colored person as a slave.

Miller v. *Belmonti*, 339.

7. Where a partner in a particular partnership, entitled to an undivided third of certain immovable property, permits his copartner to mortgage the whole for the payment of an individual debt of the latter, he may be estopped from disputing the mortgage; but such permission will not amount to a renunciation of his title, nor to an acknowledgement of the mortgagor's title to the whole of the property. *Thomson* v. *Mylne*, 349.

8. Action to recover certain slaves purchased by defendant from a third person, in whose possession they were at the time of the sale. It was proved that they had been brought into this State by the vendor as the administrator of the succession of plaintiff's ancestor, and had remained in his possession several years; that they had been seized under execution as the property of the vendor, and offered for sale, but were not sold, in consequence of the general notoriety of the fact, that they were not the property of the party in whose hands they were seized; and that defendant was present when they were offered for sale, probably with a view to bid for them: *Held*, that the facts warrant the presumption that the defendant was aware of the defect in the title of his vendor. Judgment for the plaintiffs. *Jenkins* v. *Theriot*, 450.

See 40 *infra.*

III. *Interest of Witness.*

9. A witness holding other property under a title through which the party offering him claims the property in litigation, has an interest in the question rather than in the case; and any objection on that account goes to his credit, and not to his competency. *Prevost* v. *Ellis*, 56.

10. Where, in case of a judgment against defendants, one offered as a witness will be liable to the latter for the debt and costs, but, in case of a judgment in their favor, will be bound for the debt alone, he is incompetent. An interest in the costs renders a witness incompetent. *Montross* v. *Hillman*, 87.

11. To render one of the original parties to a policy of insurance, alleged to have assigned all his interest therein for the benefit of his creditors, competent as a witness for the other insurers in an action on the policy, the acceptance of the assignment by all the creditors must be proved, where the assignment, stipulating the release of the debtor, is not so manifestly for their benefit, that their acceptance can be presumed. Nor will such a witness be rendered competent by the execution, in open court, of an instrument abandoning all his interest in the policy for the benefit of his creditors. *Per Curiam:* He is still interested that the creditors who have not released him should receive a part of the amount sued for; and he cannot release himself.

Wellington v. *Merchants' Insurance Company*, 222.

IV. *Examination of Witness.*

12. Where a number of interrogatories have been propounded to different witnesses, an exception that they "contain leading questions," without further specification, will be disregarded, as too general. *Ib.*

V. *Commission to take Testimony.*

13. Where a party notified by his adversary to attend at a certain hour at a commissioner's office, for the purpose of taking the deposition of a witness, attends at the appointed hour, waits for half an hour without the commissioner's appearing, and leaves, and, after his departure, the commissioner arrives, and proceeds to take the deposition, it will be inadmissible on the trial.

Clark v. *Hartwell*, 201.

14. Notice of the time and place of taking the deposition of a witness about leaving the State, left at the office of attorney of record, during the absence of the latter from the State, with a white person over fourteen years of age, is sufficient. *Lindley* v. *Hagens*, 203.

15. Where a commission to take testimony is addressed to a resident of another State by name, as a special commissioner, he becomes an officer of the court for that purpose, and no proof is required of his qualifications to discharge the duties imposed on him. *Succession of Baum*, 314.

16. Where the facts intended to be proved under a commission, taken out by parties who intervened for the purpose of prosecuting the suit for their own benefit, as creditors of the plaintiff, on an allegation that he was about to abandon it, go to support the allegations of the petition, the plaintiff cannot exclude the evidence, on the ground that he had no opportunity to cross-examine the witnesses. *Ib.*

17. Commissioners to take depositions in other States or Territories of the Union, appointed by the Governor under the act of 10 March, 1838, are state officers, and the courts are bound to recognise their official signatures and seals.

Dwight v. *Splane*, 487.

18. One to whom a commission to take testimony is directed is not required to reduce the testimony to writing himself. It is sufficient, when not taken down by the witness, that it be written by any disinterested person. *Ib.*

19. The fact that the blanks in a printed commission to take testimony were filled up by an attorney of one of the parties, is immaterial, where the commission was signed by the clerk of the court from which it was issued, and sealed with his official seal. *Ib.*

20. A commission to take testimony within the State, may be directed, generally, to any judge, or justice of the peace, in a particular parish. *Ib.*

21. Where a witness examined under a commission neglects to answer a cross-interrogatory, but in answering the last direct interrogatory states facts not called for by it, but which are a complete answer to the cross interrogatory, the statement will be presumed to have been intended as an answer to the latter, and the evidence will be admitted. *Ib.*

See 12, *supra.*

VI. *Admissibility and Sufficiency of Evidence under the Pleadings.*

22. Action to recover an amount due for drayage, and defence that the price

claimed exceeded the value of the services. Plaintiff having proved by a witness that defendant had agreed to pay a certain price therefor, the latter offered to introduce evidence to show that the usual price was less. *Held*, that the evidence was admissible, defendant having a right to introduce evidence to contradict plaintiff's witness, or to establish a different price.

McGawley v. *Gannon*, 164.

23. Where a married woman, sued on her note, secured by mortgage, given for the repayment of money counted and delivered to her in the presence of the notary's clerk, adduces evidence which shows that the transaction was a disguised advance to her husband, she will be bound, if it be shown that she subsequently converted the fund to her own use, under false pretences, to the prejudice of the creditors of her husband. *Alling* v. *Egan*, 244.

24. Plaintiff having purchased two lots of ground described in the act of sale as "*formant islets*," and situated in a certain division marked on a plan deposited in the notary's office, sued the occupier of a contiguous lot to cause a street to be opened. No street was mentioned in the act of sale to plaintiff, nor was any parol evidence offered to prove the existence of one at the time of the sale. An old plan was produced as being the one referred to in the sale, on which the street was marked; but there was no proof that it was marked thereon at the time of the sale, while there was evidence, on the face of the plan itself, showing that other streets describes on it, had been marked at a subsequenf period. *Held*, that the evidence was insufficient to prove the dedication of a street, of which no mention was made in the sale.

Guillotte v. *Toby*, 294.

VII. *Judicial Records and Proceedings, and Copies thereof.*

25. An extract certified by the clerk from the minutes of the court, showing that a judgment had been rendered in a suit, though the minutes were signed by the judge, is not the best evidence of the judgment, as the law requires a judgment to be given and signed in every case; and it is to be presumed that one exists until the contrary is shown. The extracts from the minutes would be admissible to prove a judgment rendered in 1814, on proof that no judgment could be found in the record, and that no other than that entered on the minutes appeared to have ever existed, or that it had been lost. *Choppin* v. *Michel*, 233.

26. Copies of judgments of the Supreme Court, certified by the clerk, are sufficiently proved. *Ib.*

27. A final judgment rendered in another State between the same parties, where both were before the court, will be conclusive between them, on an application to render the judgment executory here. The plaintiff cannot be called upon again for proof of his demand.

Hazard v. *Agricultural Bank of Mississippi*, 326.

28. To prove the reversal by the Supreme Court of the United States of a judgment obtained in a Circuit Court, defendants offered in evidence a printed copy of the record of the suit in the Supreme Court certified by the clerk of the Circuit Court, under the seal of his court, to be a true copy of the record and the proceedings of the Circuit Court in the action; and a copy of the mandate of the Supreme Court, reversing the judgment below, and remanding the case for further proceedings, also certified, by the clerk of the Circuit Court, under

the seal of his court, to be a true copy of the original on file in his office. There was no copy of the judgment of the Supreme Court among the papers offered in evidence. On an exception to the evidence: *Held*, that it was inadmissible, there being no proof that the person who signed as clerk of the Circuit Court was clerk of that court, and the record not being authenticated as required by the act of Congress of 26 May, 1790.

United States v. *Bank of the United States*, 418.

29. The courts of this State are not bound to know the clerks of the courts of the United States in other States; nor will any greater weight or authority be given to their certificates and official acts, than to those of the clerks of the state courts of such States. *Ib.*

30. The associate judges of the City Court of New Orleans, as well as justices of the peace, being officers of the State, their signatures and official seals prove themselves. *Dwight* v. *Splane*, 487.

VIII. *Non-judicial Records, and Copies thereof.*

31. An act of sale of lands, passed in 1774 before a Spanish commandant in Louisiana, in the presence of two witnesses, which recites that the vendor did not sign it because he could not write, and that the title was delivered to the vendee who took immediate possession, and which had remained among the notarial records of the parish, is admissible in evidence to prove a title to the property. *Per Curiam:* The act would have been sufficient evidence of title under the Spanish law, which permitted parol sales of immovables; it has all the requisites of an authentic act; and the absence of the vendor's signature is sufficiently accounted for by the public officer who received it, the ordinary mark of a party to an authentic act not being required at that period.

Choppin v. *Michel*, 233.

32. The signatures of the Spanish governors, and other known officers of the former provincial governments of Louisiana, prove themselves. Where any question is raised as to the authenticity of such signatures, or the authority of the officer, the burden of proving the fraud or want of authority, devolves on the party alleging such fraud or want of authority. *Choppin* v. *Michel*, 233.

33. An act of the legislature of Pennsylvania, of 5 March, 1842, provides that any assignment of property, made by a bank in pursuance of that act, must be approved by the Court of Common Pleas of the county in which the bank is situated, and be recorded in the office of the Recorder of Deeds for the same county; and an act of 14 April, 1834, authorizes the prothonotaries of the courts of Common Pleas to sign the judgments of those tribunals. Plaintiffs offered in evidence a copy certified by the Recorder of Deeds to be a true copy from the records of his office, of an assignment made by a bank under the act of 1842, and of a certificate annexed to it signed by the prothonotary of the Court of Common Pleas, and sealed with its seal, reciting that the court had approved of the assignment. Appended were certificates from the presiding judge of the Court of Common Pleas attesting the signature and official capacity of the Recorder of Deeds, and from the prothonotary of the court attesting the signature and official capacity of the presiding judge. Defendants excepted to the evidence, alleging in their bill that the assignment could

only be proved by producing the original, or, on showing that it could not be had, a copy compared therewith; that the act of Congress respecting the authentication of non-judicial records, was inapplicable to the case; and, if applicable, had not been complied with. The bill did not state in what the act had not been complied with. *Held*, that the act of Congress applies to such a case; that so general an objection as that the law has not been complied with, is insufficient in a bill of exceptions; and that such generality cannot be corrected by specifications after appeal. *Horn* v. *Bayard*, 259.

IX. *Inadmissibility of Parol Evidence under art.* 2256 *of the Civil Code.*

34. Parol evidence is inadmissible to prove that a slave sold by defendant to plaintiff, was represented as possessing certain qualifications not mentioned in the act of sale. *Milliken* v. *Andrews*, 241.

35. Parol evidence is inadmissible to alter, modify, or contradict a written act of transfer of immovables or slaves, or to prove any agreement or stipulation beyond its contents, where there is no allegation of fraud, error or violence. C. C. 2256. But such evidence is admissible to prove that the adjudication price of real estate sold at auction, was paid to a creditor holding a mortgage on the property, and the manner of such payment. *Macarty* v. *Gasquet*, 270.

36. Action by a wife for a separation of property, claiming a slave as paraphernal, and opposition by the creditors of the community. Plaintiff offered in evidence a notarial act of sale of the slave, in which the vendor acknowledged the receipt of a sum of money from the plaintiff, as the price. Plaintiff then offered parol evidence to prove that the transaction was in fact a *dation en payement*, and that the slave was given to plaintiff by her mother, as an advance upon her inheritance: *Held*, that the evidence was admissible to prove that the slave was acquired by the funds of the wife, and that, in this respect, it does not contradict the notarial act. *Gonor* v. *Her Husband*, 526.

X. *Admissibility of Parol Evidence to establish Date of an act Sous Seing Privé.*

37. As a general rule, an act under private signature has no date as to third persons; but a date may be given to it by facts *dehors* the act, as by proof of the death of the person in whose hand-writing it is shown to have been drawn up, or of a subscribing witness. *Prevost* v. *Ellis*, 56.

38. Proof, by a subscribing witness, that an act of sale of real property *sous seing privé*, was signed and executed on the day of its date, is insufficient to give it effect from its date as to third persons. Parol evidence is admissible only to prove the date of the act, as between the parties. *Ib.*

XI. *Proof of Fraud.*

39. The provision of art. 2256 that parol evidence shall not be admitted against or beyond the contents of written acts of transfer of immovables, was designed for the protection of contracting parties against each other. It does not apply where a partner claims from his co-partner a sum of money, alleged to have been privately and fraudulently received by him from a purchaser of partnership property as a part of the price, and offers the purchaser as a witness to

prove the payment of the money, though not mentioned in the notarial act of sale signed by both partners and the purchaser. The testimony of the purchaser is admissible. *Succession of Tilghman*, 124.

40. Fraud will not be presumed. It cannot, generally, be proved by direct and positive evidence; but the circumstances going to establish it must be strong, consistent, and calculated to induce the belief that a fraudulent intent existed. *Follain* v. *Dupré*, 454.

41. To annul a sale on the ground of fraud, the creditor must prove the inability of the debtor to pay his debts, and injury to himself. *Per Curiam:* A contract, though made in bad faith, cannot be rescinded by creditors unless it operate to their injury. C. C. 1973. *Lafleur* v. *Hardy*, 493.

XII. *Proof of Marriage.*

42. The fact that a marriage was celebrated by a person acting as a justice of the peace, and that the parties afterwards lived together as man and wife, is sufficient legal evidence of a marriage; and the testimony of a witness who swore that he was a justice of the peace in another State, and celebrated the marriage, is sufficient proof of the fact that the witness was a justice. *Dunn* v. *Kenney*, 249.

XIII. *Secondary Evidence.*

43. Action to recover of defendant the value of certain carriages, consigned by plaintiff to a third person for sale, and sold under a *fi. fa.* by defendant, and purchased by him as the property of one of his debtors. The consignee, who resided in another State, having since died, plaintiff offered the clerk of the consignee as a witness. On an objection to his testimony, on the ground that his only knowledge of the matters in controversy, being derived from a correspondence between the plaintiff and consignee, not produced nor accounted for, was not the best evidence: *Held*, that his testimony was admissible, and that plaintiff cannot be supposed to have the means of procuring the books and papers of the deceased, nor the letters written to him. *Hyde* v. *Hepp*, 159.

44. Testimony of witnesses taken in a suit between other parties, offered to prove possession by persons long since dead, is inadmissible, where the affidavit made for the purpose of laying a foundation for its admission does not state that the witnesses are dead, nor what other efforts have been made to procure other evidence of the fact. *Choppin* v. *Michel*, 233.

45. One who has loaned money to an insolvent, before his surrender, for the purpose of satisfying a judgment obtained against him, should prove the loan and subrogation and the receipt of the money by the judgment creditor, by a notarial act. C. C. 2156 § 2. But where the loan and subrogation were proved by authentic act, and parol evidence was admitted in the lower court, without objection, to establish the payment to the creditor, it will be too late to object to the nature of the proof of payment, after appeal. *Wilcox* v. *His Creditors*, 346.

46. Parol evidence is inadmissible to prove the appointment of a curator to a succession, unless it be first shown that the record of his appointment has been lost or destroyed. *Rouly* v. *Bérard*, 478.

See 58, *infra.*

XIV. *Irrelevant Evidence.*

47. Letters written by a third person to an agent are inadmissible in evidence against the principal. *Garrett* v. *Morgan*, 447.

48. Evidence, though improperly admitted, will be disregarded, where it could not have operated to the disadvantage of the party who objected to it. *Rouly* v. *Bérard*, 478.

XV. *Evidence of Particular Persons.*

1. *Parties.*

49. Where, in an action for the settlement of partnership accounts, the defendant, in whose hands the books, accounts, and evidences of debts due to the firm remained at the time of its dissolution, is proved to have admitted that there were outstanding debts due to the partnership to a certain amount, and he states in his answer that he will file a list of them, but omits to do so, and shows no diligence in collecting them, judgment will be given against him for a sum equal to the plaintiff's share in the debts due to the partnership at the time of its dissolution. *Cazeau* v. *Faget*, 10.

50. Where, in answer to an interrogatory, a party states facts not necessarily connected with that as to which he was interrogated, such irrelevant matter will be struck out, on motion. *Smith* v. *Richardson*, 516.

2. *Notaries.*

51. A notary cannot testify to any thing that will contradict or strengthen his official acts. *Follain* v. *Dupré*, 454.

52. The notary by whom a protest was made and notice given of the protest of a note or bill, is a competent witness to prove the protest and notice. He is not disqualified by his liability for neglect or mistakes in the discharge of his official duties. *Ib.*

3. *Persons Indebted to, or Possessing Property of Defendant.*

53. The right given by the 13th section of the act of 20 March, 1839, to a plaintiff who has applied for a writ of *fi. fa.*, to propound interrogatories to a third person believed to have property or effects under his control belonging to defendant, or to be indebted to him, can only be exercised so long as the writ remains in the hands of the sheriff. *Raboteau* v. *Valeton*, 218.

XVI. *Evidence in Particular Actions.*

1. *In Actions on Bills of Exchange and Promissory Notes.*

54. In an action against the endorser of a note, the signature of the maker need not be proved. *Young* v. *Patterson*, 7.

55. In an action against the endorser of a note, the notary who had protested it, certified, that he had left notices of the protest at the counting-house of defendant, in a letter addressed to him, handed to a clerk of competent age, there employed. A witness introduced by defendant swore, that he was the only clerk of the latter at the maturity of the note, and that he never received any notice of protest. *Per Curiam:* This does not destroy the effect of the notary's certificate. The notice was enclosed in a letter, which it must be presumed was sealed, and the witness thus prevented from knowing its contents. *Ib.*

56. The evidence of a witness who states, that he verily believes that notice of the neglect or refusal of the acceptor to pay a bill at maturity was given to the drawer, but does not say how it was given, nor assign any reason for his belief, nor state any fact from which the court may judge of the sufficiency of the notice, is not sufficient proof of notice.

Krœutler v. *Bank of United States*, 213.

57. An endorsement of a partial payment, in the hand writing of the holder of the note, without other proof that a payment was made at the date mentioned in the endorsement, is insufficient to interrupt prescription.

Splane v. *Daniel*, 449.

58. Where a plaintiff relies on the protest and certificate of a notary, under the act of 13 March, 1827, to prove a demand of payment and notice of protest, parol evidence is inadmissible to explain, contradict, or add to the written evidence; nor can a portion of such evidence be used to make out one part of the case, and the testimony of the notary, as to any thing required by law to be inserted in such acts, to make out another part. As to any other facts, the notary is competent. But a plaintiff may offer the protest and certificate in evidence, and the parol testimony of the notary to prove a demand and notice, with the view, in case the protest and certificate should be insufficient under the statute, to rely on the parol evidence alone. If the protest and certificate be imperfect and insufficient under the statute, they are not the best evidence, and, consequently, parol testimony cannot be excluded as secondary.

Follain v. *Dupré*, 454.

59. The acts of 14] March, 1823, and 13 March, 1827, authorising notaries, parish judges, and, in some cases, justices of the peace, to protest and give notice of the protest of bills and notes, have introduced no new rule as to demand of payment, or the diligence to be used in giving notice of protest. They merely introduced a new mode of proof, unknown to the commercial law. *Ib.*

60. A protest by a notary of a domestic bill or promissory note for non-acceptance or non-payment, and his certificate of notice to the endorser, are inadmissible under the general commercial law. They are only received where there is a statute or local law authorising their admission. By the act of the legislature of this State, of 13 March, 1827, a notary is authorised to do what the holder of the bill or note is required, under the commercial law, to do himself, and to certify the facts officially; but the mode of proof authorised by the statute is not exclusive. *Ib.*

61. Where the protest of a notary is offered in evidence to prove a demand of payment of the makers of a note, it must appear from the protest itself that the notary had the note in his possession, and demanded payment at the proper place and from the proper party. The answer of the party of whom the demand was made, must also appear in the protest. *Dupré* v. *Richard*, 495.

62. Where, in an action against an accommodation endorser, the plaintiff has had a fair opportunity for making out his case, and has failed, the court will not render a judgment as in case of non-suit, on the mere suggestion that the notary, who was not examined as a witness, might, on another trial, testify to facts that would entitle the plaintiff to recover. *Ib.*

2. *In Petitory Actions.*

63. To make out a title by prescription, such as will authorise a recovery in a petitory action, where possession has been decreed to be in the other party, plaintiffs must, at least, show clearly that, before possession was decreed to their adversary, they held peaceable, public, continuous, uninterrupted and unequivocal possession, a sufficient length of time, under a just title, with proof of the exact commencement of that possession. C. C. 3452, 3453. *Prevost* v. *Ellis*, 56.

64. The plaintiff in a petitory action can recover only on the strength of his own title. *Sandoz* v. *Gary*, 529.

EXCEPTIONS, BILL OF.

1. So general an objection as that the law has not been complied with, is insufficient in a bill of exceptions; and such generality cannot be corrected by specifications after appeal. *Horn* v. *Bayard*, 259.

2. Where a number of interrogatories have been propounded to different witnesses, an exception that they "contain leading questions," without further specification, will be disregarded, as too general. *Follain* v. *Dupré*, 454.

EXECUTION OF JUDGMENTS.

1. Where the notice of seizure under a *fi. fa.* is illegal, the sale will be set aside. *Mississippi Marine and Fire Insurance Company* v. *Bank of Louisiana*, 47.

2. Where, after a seizure under a *fi. fa.*, the sheriff is enjoined from further proceedings, he should not return the writ into court, but retain it to be proceeded with in case the restraining order be withdrawn or annulled. Where a seizure has been made under a *fi. fa.* before the return day, the sheriff should retain the writ until the property is sold, or he is ordered by the plaintiff, or other competent authority, to release it. Where the seizure has been made before the return day, he may do all that the law requires of him, after that time. *Cochrane* v. *Bank of the United States*, 64.

3. Where, after a seizure under a *fi. fa.*, the sheriff, on being enjoined from further proceedings, returns the writ into court, and under an *alias fi. fa.* proceeds to sell the property originally seized, without making any new seizure, the sale will be annulled. *Ib.*

4. The share of a member of a partnership may be seized and sold to satisfy his individual creditors, subject to the debts of the partnership; and such seizure, if legal, operates a dissolution of the partnership. C. C. 2794. But a creditor of one partner cannot seize under execution, nor attach any particular thing or piece of property belonging to the partnership, nor any portion of it, to satisfy his debt. The whole share or interest of the indebted partner in the partnership must be seized or attached, when the partnership will be dissolved, and the creditor entitled to satisfaction out of the share of his debtor, after payment of the partnership debts. The interest of a partner is a distinct thing, and must be taken as a whole. *Bank of Tennessee* v. *McKeage*, 130.

5. The mere seizure under a *fi. fa.* of a judgment in favor of a debtor, does not divest the property of the latter, and transfer it to the seizing creditor. It gives him at most a right to proceed and sell the judgment, and to be paid by

preference out of the proceeds. A *fi. fa.* is the warrant of the sheriff, authorising him to seize property and keep it, and to sell it to satisfy the judgment under which it was issued. When a seizure has been made, the sheriff is not bound to return the writ, though it have subsequently expired. He may retain it, and sell the property seized. If he returns the writ, he will be without authority to hold, or dispose of the property; and any privilege resulting from the seizure will cease to exist.

Sheldon v. *New Orleans Canal and Banking Company*, 181.

6. Where the proceeds of property seized and sold under a *fi. fa.* are claimed in virtue of a previous seizure under a *fi. fa.*, the claimant must oppose, by way of third opposition, the application of the proceeds to the satisfaction of the second execution. C. P. 396, 397, 401, 402. *Ib.*

7. A sheriff or marshal is the agent of the plaintiff in execution only so far as he derives authority from the writ placed in his hands. The moment it is returned into court, his authority ceases. *Raboteau* v. *Valeton*, 218.

8. The right given by the 13th section of the act of 20 March, 1839, to a plaintiff who has applied for a writ of *fi. fa.*, to propound interrogatories to a third person believed to have property or effects under his control belonging to the defendant, or to be indebted to him, can only be exercised so long as the writ remains in the hands of the sheriff. *Ib.*

9. A sale of the contents of a coffee-house or shop, by notarial act, accompanied by delivery, cannot be treated as a nullity; and where a *fi. fa.* is levied on the property as still belonging to the vendor, the plaintiff in execution will be responsible to the purchaser in damages. But where no serious injury is shown to have been sustained by the plaintiff, and defendant acted without malice, the damages will be nominal only. *Presas* v. *Lanata*, 288.

10. Where the rights of a plaintiff in an action against a succession have been seized under a *fi. fa.*, he cannot discontinue. *Succession of Baum*, 314.

11. The seizure under a *fi. fa.* of the interest of a debtor in notes, entitles the seizing creditor to be paid by preference out of the proceeds.

Lafleur v. *Hardy*, 493.

EXECUTOR.

See Successions.

FAMILY MEETING.

See Minor 2.

FIERI FACIAS.

See Execution of Judgments.

FIREMEN'S INSURANCE COMPANY OF NEW ORLEANS.

The appellants, stockholders in the Firemen's Insurance Company of New Orleans, having paid only the first instalment of five per cent on each share, the directors declared the stock forfeited. Plaintiff having obtained judgment against the company, sued out a *fi. fa.*, under which interrogatories were propounded to the appellants; and, on a rule taken on them to show cause why

they should not be compelled to satisfy the execution to the extent of their unpaid subscriptions: *Held*, that under the act of 10 March, 1838, incorporating the company, the directors had no right to declare the stock forfeited after the payment of only five per cent, and that the appellants were bound to satisfy plaintiff's judgment to the extent of their unpaid subscriptions.

Dixon v. *Firemen's Insurance Company*,, 252.

FRAUD.

1. Fraud will not be presumed. It cannot, generally, be proved by direct and positive evidence; but the circumstances going to establish it must be strong, consistent, and calculated to induce the belief that a fraudulent intent existed.

Follain v. *Dupré*, 454.

2. Fraud in obtaining an endorsement, is no defence to an action against the endorser, by one to whom the note had been transferred in the usual course of business, for a good consideration, without notice, unless frand or collusion can be proved as to him. *Ib.*

GARNISHEE.

See ATTACHMENT 4.

GUARANTEE.

See SURETY 1.

HUSBAND AND WIFE.

1. A wife having obtained a judgment of separation of property, levied a *fi. fa.* on the property of the husband, who subsequently applied for the benefit of the bankrupt act of Congress, of 19 August, 1841, and was discharged. The wife's execution not having been satisfied in full: *Held*, that the balance of the debt due by the husband, was extinguished by his discharge.

Alling v. *Egan*, 244.

2. A creditor who seeks to enforce the payment of a note executed by a married woman, though separated in property from her husband, must prove that the consideration for which it was given, enured to her advantage. *Ib.*

3. Where a married woman, sued on her note, secured by mortgage, given for the repayment of money counted and delivered to her in the presence of the notary's clerk, adduces evidence which shows thot the transaction was a disguised advance to her husband, she will be bound, if it be shown that she subsequently converted the fund to her own use, under false pretences, to the prejudice of the creditors of her husband. *Ib.*

4. The fact that a marriage was celebrated by a person acting as a justice of the peace, and that the parties afterwards lived together as man and wife, is sufficient legal evidence of a marriage; and the testimony of a witness who swore that he was a justice of the peace in another State, and celebrated the marriage, is sufficient proof of the fact that the witness was a justice.

Dunn v. *Kenney*, 249.

5. All the effects or property in the possession of the spouses, or either, at the

time of the dissolution of the community by death, are presumed to belong to the community. C. C. 2374. *Succession of Baum*, 314.

6. The heirs of a wife may renounce the community, for the purpose of exonerating themselves from the debts contracted during the marriage (C. C. 2379); but the husband, having been the head thereof, can never do so, either directly or indirectly. *Ib.*

7. Though the general rule established by the Civil Code is, that purchases made during the marriage, by either spouse, belong to the community, in whosesoever name made, yet a wife may acquire separate property by the *bona fide* reinvestment of her paraphernal funds, of which her husband never had the administration, or by a *dation en payement* in consideration of a separate and paraphernal claim. *Broussard* v. *Her Husband*, 445.

8. A judgment in a suit for separation of property will not be conclusive against the wife's right to property, not mentioned as her separate property in the judgment of separation, in a contest with the creditors of the husband, especially with such as became so before the judgment was rendered. *Ib.*

9. A note executed by a married woman, without the authorisation of her husband or of the judge, for the fees of counsel employed by her to institute a suit against her husband for a separation of property, is not binding on her. C. C. 123, 127, 129, 1775, 1779. The order of the judge, authorising her to sue, cannot be considered as empowering her to contract with any one with reference to the suit. But where a suit for separation has been actually brought, the attorneys employed by her may sue, on a *quantum meruit*, for the value of their services. *Crow* v. *Yocom*, 506.

10. Under the Code of 1808, when a slave formed part of the paraphernal property of the wife, the issue of the slave was also paraphernal. Code of 1808, book 3, tit. 5, arts 50, 62; book 2, tit. 2, art. 4; book 2, tit. 3, art. 12. Under the Spanish laws, the issue belonged to the community of gains. *Gonor* v. *Her Husband*, 526.

11. The Spanish laws and the Codes of 1808 and 1825, agree in the general principle, that all property acquired by purchase during the marriage, whether in the name of the husband or wife, belongs to the community, (Febrero, part 2, book 1, ch. 4, § 1, no. 6; Code of 1808, book 3, tit. 5, art. 64; C. C. 2371, 2374,) even where the purchase is made with the funds of the wife; but from this rule are excepted things received by either spouse, as a *dation en payement* of money due as a separate and individual right, or purchases made as a *bona fide* reinvestment of money under the wife's control, and forming part of her paraphernal property. Thus a *dation en payement* by a mother, made to the wife, as an advance upon her inheritance, is paraphernal. *Ib.*

INJUNCTION.

Where a defendant in an action commenced by injunction, excepts to answering to the merits, on the ground that the oath taken and the bond given to obtain the injunction, were taken and executed by one claiming to act as the attorney in fact of the plaintiff, though no copy of the power was annexed to the petition, the power must be produced, or the action will be dismissed. C. C. 320. *Mayes* v. *Smith*, 503.

INSOLVENCY.

1. Property surrendered by an insolvent, subject to a mortgage, having been sold by his syndic, was purchased by the mortgage creditor, and the price retained in satisfaction of his claim. Bond was given by the creditor, with security, for any amount which he might ultimately have to contribute towards the payment of the privileged expenses of the estate; but no mortgage was reserved on the syndic's sale, nor was it recorded in the office of the Recorder of Mortgages. The property was afterwards sold by the purchaser to a third person, to whom a certificate was delivered from the Recorder of Mortgages, showing that the property was clear of incumbrance. On a rule on the second purchaser, to show cause why the property in his hands should not be sold to satisfy the contribution due by his vendor, the mortgage creditor, for the privileged expenses of the estate: *Held*, that the defendant in the rule not being aware that his vendor was bound to pay any part of the price of the property as a contribution for privileged expenses, and neither the act of sale nor the *procès-verbal* of the adjudication having been recorded, and no mortgage or privilege reserved by the syndic, he could be made liable only in case of having expressly assumed the payment of the contribution. Rule discharged. C. C. 3238, 3314, 3317. *Duplesis* v. *His Creditors*. 4.

2. The commission allowed to the provisional syndics of the creditors of an insolvent estate, by the 11th section of the act of 20th February, 1817, of "one per cent on the appraised value of the goods and effects confided to their care," is to be calculated on the appraised value of the property as shown by the schedule of the insolvent. *Barkley* v. *His Creditors*, 28.

3. A provisional syndic of an insolvent estate has no other duty to discharge than that of keeping the property surrendered as a deposit, performing such conservatory acts as may be necessary for the interest of the insolvent and his creditors, and demanding and receiving the rents and income of the property, and such debts as may become due during his administration, which expires on the nomination of definitive syndics. *Ib.*

4. Law charges are the costs incurred in court in the prosecution of a suit, to be paid by the party cast. Such costs, when taxed according to law, are privileged against the insolvent's estate, whether incurred previously to the insolvency, or in the *concurso*. C. C. 3162, 3163. *Ib.*

5. The costs of the proceedings incurred in establishing a charge of fraud against an insolvent, are included among the law charges privileged against the estate. *Ib.*

6. A cashier of a bank has no authority, by virtue of his office, to represent the bank at a meeting of the creditors of an insolvent, and to vote for a syndic. A resolution of the board of directors can alone empower him to do so. But a ratification by the directors of the acts of a cashier who had voted at a meeting of creditors without authority, made after the proceedings before the notary were closed, and the ten days had expired after which the rights of the parties claiming the syndicship became fixed, cannot affect rights previously acquired. C. C. 1789, 2252. Act 20 February, 1817. *Reed* v. *Powell*, 98.

7. A judgment discharging the future property of an insolvent, who had made a

cessio bonorum, from all proceedings for the recovery of debts previously contracted, though it may not have strictly conformed to the law under which it was rendered, will be conclusive against a creditor who was a party to the proceedings, and took no appeal therefrom within the time prescribed by law.

Gurlie v. *Flood*, 166.

8. One who was a creditor of an insolvent at the time of his surrender, cannot take out an execution against property subsequently acquired. Property acquired since the cession cannot be proceeded against by any of the creditors individually. It must be abandoned for the benefit of all the creditors, and those who have become such since the first cession must be paid in preference to the others. C. C. 2173. *Ib.*

9. The property of a debtor being the common pledge of his creditors, every act done by him with intent to deprive them of their eventual rights upon it, is illegal. C. C. 1963, 1964. *Barker* v. *Phillips*, 190.

10. Where one purchases property from an absconding debtor, with notice that his object in selling it was to deprive his creditors of their recourse upon it, and such purchase operates to their injury, it will be annulled. C. C. 1973. But the purchaser, though in bad faith, will be entitled to a restitution of so much of the consideration or price paid by him, as he shall prove to have enured to the benefit of the creditors, by adding to the amount applicable to the payment of their debts. C. C. 1977. *Ib.*

11. A syndic of the creditors of an insolvent, though himself an attorney and counsellor at law, may procure the assistance of counsel in cases in which he needs it. He is a judge of the necessity; and where the value of the services is proved, and it is not shown that such assistance was improperly sought, the fees of the counsel must be paid out of the estate surrendered.

Wilcox v. *His Creditors*, 346.

12. Prescription is interrupted by a *cessio bonorum* made by the debtor. *Ib.*

INSURANCE.

1. To render one of the original parties to a policy of insurance, alleged to have assigned all his interest therein for the benefit of his creditors, competent as a witness for the other insurers in an action on the policy, the acceptance of the assignment by all the creditors must be proved, where the assignment, stipulating the release of the debtor, is not so manifestly for their benefit, that their acceptance can be presumed. Nor will such a witness be rendered competent by the execution, in open court, of an instrument abandoning all his interest in the policy for the benefit of his creditors. *Per Curiam:* He is still interested that the creditors who have not released him should receive a part of the amount sued for; and he cannot release himself.

Wellington v. *Merchants' Insurance Company*, 222.

2. There can be no abandonment as for a total loss, in a case in which the damage is under fifty per cent of the value of the thing insured.

Riley v. *Ocean Insurance Company*, 255.

3. Where the policy provides that the vessel insured is warranted free from average, unless general, under fifteen per cent, the limitation forms a part of the contract, and the insurers will not be liable unless the loss is proved to have exceeded that amount. *Ib.*

4. One who has effected insurance on his life may assign the policy, or a part of it, to a *bona fide* creditor; but such an assignment will be without effect as to third persons, creditors of the insured, where there was no proof of notice to the assurers before the death of the assured, nor of the acceptance of the assignment by the transferee before that date, and the policy remained in the possession of the assignor. C. C. 1804, 2612, 2613. *Succession of Risley*, 298.

INTERPRETATION.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 19.

JUDGMENT.

1. An action to recover the amount of a policy having been instituted against an insurance company, a short time before its dissolution by the expiration of its charter, an answer was filed by the attorney of the company a few days after its dissolution; he shortly afterwards resigned his oppointment, and no further proceedings were had for several years. The charter of the company made each shareholder "liable, in his individual and private capacity, to the extent of his shares, in any suit or action pending at the time of the dissolution of the charter, or to be brought thereafter." A few days before the dissolution of the charter, the company transferred, for a certain sum, all its capital stock to another company, which guarantied the stockholders of the old company from all further responsibility as such. The action was tried, some years after, *ex parte*, in the absence of any representative of the company or its stockholders, and without notice to, and in the absence of, any one interested in the defence, and judgment rendered in favor of the plaintiff. In an action, by one of the stockholders of the dissolved company, to annul the judgment: *Held*, that the judgment was illegal and void; that the defendants, by the expiration of their charter, had lost all capacity to appear in court; that the plaintiff should have cited the stockholders, in case he intended to exercise his recourse against them under the charter, and have made them defendants, unless he chose to avail himself of the transfer of the stock, and to call the transferrees to defend the suit under the responsibility assumed by them; and that the plaintiff in the action of nullity, being still responsible for the debts of the dissolved corporation to the extent of the shares transferred by him to the new company, had a sufficient interest to authorise him to sue to annul the judgment. C. P. 606.
Musson v. *Richardson*, 37.

2. In annulling a judgment on the ground of the neglect of the plaintiff to make the proper parties, after the defendants, an incorporated company, had become, pending the suit, incapacitated to appear in court by the expiration of their charter, the Supreme Court will not declare the proceedings invalid only from the date of the dissolution, and reserve to the original plaintiff the right to make other parties and to proceed with his action. The judgment complained of being the only matter in controversy, if illegal, it will be simply annulled.
Ib. 43.

3. A minor heir is not legally represented by his tutor, on an application for the homologation of the accounts of the executors, where the tutor, as one of the executors, claims, with his co-executor, a sum for commissions on the estate of

the deceased. The minor should have been represented by his under-tutor, or the homologation of the accounts of the executors will not form *res judicata* as to him. *Baldwin* v. *Carleton*, 109.

4. A minor is not bound to resort to an appeal or action of nullity, to protect himself against a judgment rendered against him when not legally represented. Such a judgment must be considered as one rendered without parties, and absolutely void. *Ib.*

5. The signature of the judge is required only to final judgments. C. P. 546. Other decrees, or orders, made in the course of a suit, may be entered on the minutes, and, where they may cause irreparable injury, may be appealed from, though not signed. C. P. 544. *Krœutler* v. *Bank of United States*, 160.

6. A judgment discharging the future property of an insolvent, who had made a *cessio bonorum*, from all proceedings for the recovery of debts previously contracted, though it may not have strictly conformed to the law under which it was rendered, will be conclusive against a creditor who was a party to the proceedings, and took no appeal therefrom within the time prescribed by law. *Gurlie* v. *Flood*, 166.

7. Where a mortgage has been erased in pursuance of a judgment of a court of competent jurisdiction, rights acquired by subsequent mortgagees, before any proceedings to annul the judgment, will not be affected by any illegality in it. Third persons are not bound to look beyond the judgment, which, if rendered by a court of competent jurisdiction, must have its full effect, and can only be annulled by a direct action. *Aliter*, as to the parties themselves, or their *ayans-cause* with notice; as to them, the rights of a mortgagee cannot be affected by any order or decree in a case to which he was not a party. *Delavigne* v. *Gaiennié*, 171.

8. A single decision, particularly where the point in controversy does not appear to have been thoroughly investigated, is insufficient to settle the jurisprudence of the country. *Lagrange* v. *Barré*, 302.

9. A final judgment rendered in another State between the same parties, where both were before the court, will be conclusive between them, on an application to render the judgment executory here. The plaintiff cannot be called upon again for proof of his demand. *Hazard* v. *Agricultural Bank of Mississippi*, 326.

10. A judgment in a suit for separation of property will not be conclusive against the wife's right to property, not mentioned as her separate property in the judgment of separation, in a contest with the creditors of the husband, especially with such as became so before the judgment was rendered. *Broussard* v. *Her Husband*, 444.

JURY.

The license of an attorney at law cannot be withdrawn or annulled, unless on *conviction* in the manner prescribed by the act of 27 March, 1823. The proceedings must be by information before the District Court of the domicil of the accused; and there must be a trial by jury. Act 31 March, 1808, s. 6. 27 March, 1823, s. 3. 22 March, 1826, s. 1. *Chevalon* v. *Schmidt*, 91.

LAND, POWER TO GRANT, UNDER SPANISH GOVERNMENT.

By a royal order of the 22d October, 1798, the power to grant lands was taken from the Governor of the province of Louisiana, and restored to the Intendant.
Choppin v. *Michel*, 233.

LETTING AND HIRING.

I. *Letting of Things.*
II. *Hire of Labor or Industry.*

I. *Letting of Things.*

1. Where a lessee for years, and his surety, abandon the premises, the lessor, for the preservation of the property and the protection of his rights, may collect the rent due from the sub-tenants, and procure new ones, for the benefit of the lessee or surety; and where the lessor has never refused to place the premises under their control on their complying with the lease, such acts will not be considered as amounting to a cancelling of the lease, and the lessee and his surety will be bound for the difference between the amount of the lease and that received from the sub-tenants. *Roumage* v. *Blatrier*, 101.
2. Where pending an action to enjoin an execution issued on a judgment obtained by a lessor against the surety of his lessee, for the amount of a lease for years, to be paid from time to time as the rent may become due under the lease, the lessor sells the premises, without any stipulation that the sale is made subject to the lease, the lease will be thereby dissolved. *Ib.*
3. Where a lessee of ground constructs buildings or other works thereon, with his own materials, the owner of the soil may keep them on paying the value of the materials and the price of the workmanship. C. C. 497, 498, 500. The lessee having only the right, at the expiration of the lease, to claim the value of the materials and the price of the workmanship, such buildings or works can neither be alienated nor mortgaged by him. He may alienate his right to claim compensation, or to take the buildings away; but such a right is not susceptible of being mortgaged. So, where, by the terms of the lease, any buildings erected by the lessee are to become the property of the lessor at its expiration, without his being bound to pay any compensation therefor, the lessee has only a mere moveable right of possession and enjoyment, incapable of being mortgaged. *Miller* v. *Michoud*, 225.
4. Permission to occupy certain premises, without pay, on condition of leaving whenever required by the owner to do so, does not give rise to the relation of landlord and tenant between the parties, nor invest the owner with the lessor's lien or privilege, or right of sequestration. A stipulation for rent is of the essence of the contract of lease. *Fisk* v. *Moores*, 279.
5. The provision of the second section of the act of 3 March, 1819, which declares that no appeal, taken from a judgment in favor of a landlord in an action to recover possession of the premises after the termination of the lease, shall suspend execution, is, as to judgments rendered in such cases by the City Court of New Orleans, virtually repealed by ss. 4, 5 of the act of 10 March, 1838; and a suspensive appeal may be obtained in all such cases, on

giving bond, with sufficient surety, for any damage which the appellee may sustain in consequence of the delay occasioned thereby.

State v. *Judge of City Court of New Orleans*, 394.

II. *Hire of Labor or Industry.*

6. Public notice given by a railroad company that all baggage is at the risk of the owner, not brought home to the owner, will not exonerate the company from liability as carriers. *Logan* v. *Pontchartrain Railroad Company*, 24.

7. In an action against a railroad company, to recover the value of baggage lost, it was proved to be the usage on the road for a car to run to the end of the pier forming one of the *termini* of the road, and take from steamers all the baggage and effects of the passengers, and to return to the ticket office, a short distance from the pier, where passengers were at liberty to take off their baggage without charge, the car proceeding with the remaining baggage; and that there was no person employed by the company to take care of the baggage, each passenger being expected to look out for his own. It was proved that the plaintiff 's baggage was put on the car at the end of the pier, and that he did not accompany it, but took his passage in the succeeding train. Its loss and value were established. *Held*, that the baggage was lost by the carelessness of the company; that their responsibility attached as soon as the baggage was received on the car at the end of the pier; and that the plaintiff's not accompanying his baggage does not excuse the negligence of the carriers. Judgment for the plaintiff. C. C. 2722, 2725. *Ib.*

8. Where one employed as salesman by the year, at a fixed salary, is discharged before the end of the year, without any serious ground of complaint, he will be entitled to his salary for the whole term for which he was engaged.

Decamp v. *Hewitt*, 290.

LIEN.

See PRIVILEGE 6, 7.

LITIGIOUS RIGHT.

Art. 2622 of the Civil Code, which provides that one against whom a litigious right has been transferred, may release himself by paying to the tranrferree the real price of the transfer, with interest from its date, relates only to conventional assignments. It does not apply to a transfer resulting from a sheriff's sale under execution, the transferree acquiring all the rights of the owner of the right sold. C. P. 647, 690. *Succession of Tilghman*, 124.

MANDAMUS.

The jurisdiction of the Supreme Court being appellate only, and limited by the Constitution (art. 4, s. 2,) to civil cases in which the matter in dispute exceeds three hundred dollars, it cannot issue a *mandamus* to an inferior tribunal where the amount in dispute is under that sum. A *mandamus* can be issued by the Supreme Court only in aid of its appellate jurisdiction. C. P. 829, 839.

State v. *Parish Judge of Plaquemines*, 285.

See MORTGAGE 2.

MARSHAL.

A marshal is the agent of the plaintiff in execution only so far as he derives authority from the writ placed in his hands. The moment it is returned into court, his authority ceases. *Raboteau* v. *Valeton*, 218.

MINOR.

1. A tutor, as such, without letters of administration, has no authority to administer a succession in which his pupil has an eventual or residuary interest. Such a succession must be administered as an entire thing, for the advantage of the creditors, as well as of the beneficiary heirs entitled to the residue after the payment of debts. *Beale* v. *Walden*, 67.

2. In the alienation of the property of minors, the advice of a family meeting forms an essential part of the judgment or *basis* upon which it rests. Though the Civil Code does not expressly require that the family meeting shall be held in the parish in which the court sits, such must be considered as the true construction of all its provisions, taken together. C. C. 305, 308. Act 10 March, 1834, s. 1. *Ib.*

3. A minor heir is not legally represented by his tutor, on an application for the homologation of the accounts of the executors, where the tutor, as one of the executors, claims, with his co-executor, a sum for commissions on the estate of the deceased. The minor should have been represented by his under-tutor, or the homologation of the accounts of the executors will not form *res judicata* as to him. *Baldwin* v. *Carleton*, 109.

4. A minor is not bound to resort to an appeal or action of nullity, to protect himself against a judgment rendered against him when not legally represented. Such a judgment must be considered as one rendered without parties, and absolutely void. *Ib.*

5. A memorandum at the bottom of an account rendered by plaintiff's tutor, in 1828, stated, that there was a note belonging to the estate of the minor, deposited in the office of the parish judge, which, when collected, would be accounted for. A further account was rendered in July, 1834, not including any part of the proceeds of the note, nor alluding to it, and the minor, who was emancipated by marriage, assisted by her husband, a few days after gave the tutor a receipt for the full amount coming to her, and a complete discharge. In February, 1844, plaintiff sued the heirs of the tutor, to recover her share of the proceeds of the note: *Held*, that the action was prescribed by art. 356 of the Civil Code. *Offutt* v. *Collins*, 491.

6. A minor cannot sue in his own name, but only in the name of his tutor, duly qualified to act as such. *Per Curiam:* A judgment would not be *res judicata* as to the minor, unless it appeared that the person assuming to represent him was duly qualified. Nor would the defect be cured by suing in his name, assisted by his father. *Mayes* v. *Smith*, 503.

7. A natural tutor must take an oath before he can act as such. C. C. 328. *Ib.*

8. The provisions of arts. 334, 335, 337 of the Civil Code, relate to the sale of property belonging exclusively to minors, not to that of the property of successions, in the hands of an administrator, in which the heirs, whether minors or

of age, have but a residuary interest, which can be ascertained only by a full administration. C. C. 1042, 1051. *Richard* v. *Deuel*, 508.

9. The nullity resulting from the adjudication of the property of minors at a price less than the appraisement, is a relative one, of which they alone can take advantage. *Per Curiam:* The formalities prescribed for the sale of property of minors are exclusively for their benefit. *Ib.*

MORTGAGE.

1. Where a motgage on slaves has been recorded in the mortgage office of the place where the debtor had his domicil or usual place of residence at the time of the inscription, it becomes a vested right (C. C. 3318), and cannot be destroyed by any act of the mortgagor, nor of third persons. Consequently, where the mortgagor subsequently acquired a domicil in another parish, a reinscription in the parish to which the debtor removes, is not necessary to preserve the mortgage. *Commissioners of New Orleans Improvement and Banking Company* v. *Jewett*, 20.

2. A bankrupt, discharged by a District Court of the United States under the act of 1841, has a right to have the mortgages recorded against him for the purpose of securing debts from which he has been discharged, erased, so far as they may effect his future property. And where a rule has been taken in the District Court on the recorder and the mortgagees, to show cause why the mortgages should not be erased, and no cause has been shown, and the rule has been made absolute, and the recorder refuses to make the erasure, a mandamus may be obtained from a state court to compel him to do so. *Per Curiam:* As the debts secured by the mortgages cannot be recovered but in the event of the certificate being annulled for fraud, it is unjust, in the absence of any such charge, that the mortgages should stand recorded as operating on the future property of the bankrupt. *Diggs* v. *Prieur*, 54.

3. A Recorder of Mortgages cannot be compelled to erase a mortgage without making the mortgagee a party to the proceedings, unless a judgment ordering the erasure has been rendered contradictorily with the latter.
Delavigne v. *Gaiennié*, 171.

4. Where a mortgage has been erased in pursuance of a judgment of a court of competent jurisdiction, rights acquired by subsequent mortgagees, before any proceedings to annul the judgment, will not be affected by any illegality in it. Third persons are not bound to look beyond the judgment, which, if rendered by a court of competent jurisdiction, must have its full effect, and can only be annulled by a direct action. *Aliter*, as to the parties themselves, or their *ayans-cause* with notice; as to them, the rights of a mortgagee cannot be affected by any order or decree in a case to which he was not a party. *Ib.*

5. Property not subject to alienation cannot be mortgaged. C. C. 3256.
Miller v. *Michoud*, 225.

6. Where a lessee of ground constructs buildings or other works thereon, with his own materials, the owner of the soil may keep them on paying the value of the materials and the price of the workmanship. C. C. 497, 498, 500. The lessee having only the right, at the expiration of the lease, to claim the value

of the materials and the price of the workmanship, such buildings or works can neither be alienated nor mortgaged by him. He may alienate his right to claim compensation, or to take the buildings away; but such a right is not susceptible of being mortgaged. So, where, by the terms of the lease, any buildings erected bythe lessee are to become the property of the lessor at its expiration, without his being bound to pay any compensation therefor, the lessee has only a mere moveable right of possession and enjoyment, incapable of being mortgaged. *Ib.*

7. An executor cannot grant a mortgage on any part of his testator's estate; nor can a Probate Court authorise him to do so, though for the purpose of releasing other property of the succession, already mortgaged, with a view to sell it. *Pilié* v. *Citizens' Bank of Louisiana*, 248.

8. Where a partner in a particular partnership, entitled to an undivided third of certain immovable property, permits his copartner to mortgage the whole for the payment of an individual debt of the latter, he may be estopped from disputing the mortgage; but such permission will not amount to a renunciation of his title, nor to an acknowledgement of the mortgagor's title to the whole of the property. *Thomson* v. *Mylne*, 349.

9. Though a contract by which a party alleges that he sells, and actually delivers certain lands and slaves to his endorsers, to be held by them until indemnified for their endorsements, reserving a right to redeem the slaves on discharging the endorsers from any liability, be decided by the Supreme Court to be a mortgage and not a sale, it must be duly recorded to entitle the endorsers to the privilege of hypothecary creditors, as against other creditors having mortgages regularly registered. *Succession of Hutchings*, 512.

See BANK, 6.

NEW ORLEANS, CITY OF.

Where proceedings instituted by one of the Municipalities of New Orleans, under the act of 3 April, 1832, regulating the opening and improving of streets and public places, have been discontinued before any final confirmation by the court of the report of the assessors, the owners of property required for the improvement, and assessed at a certain price, cannot claim the amount on the ground of an implied sale, though the Municipality have taken possession of the premises. *Per Curiam:* The proceedings not having been perfected, the parties can claim no rights under them; the plaintiffs can only demand the premises, or damages for the injury resulting from having been deprived of them. *Hullin* v. *Second Municipality of New Orleans*, 97.

NON-SUIT.

Where, in an action against an accommodation endorser, the plaintiff has had a fair opportunity for making out his case, and has failed, the court will not render a judgment as in case of non-suit, on the mere suggestion that the notary, who was not examined as a witness, might, on another trial, testify to facts that would entitle the plaintiff to recover. *Dupré* v. *Richard*, 495.

NOTARY.

1. A notary cannot testify as to any thing which will contradict or strengthen his official acts. *Follain* v. *Dupré*, 454.

2. The notary by whom a protest was made and notice given of the protest of a note or bill, is a competent witness to prove the protest and notice. He is not disqualified by his liability for neglect or mistakes in the discharge of his official duties. *Ib.*

NOVATION.

1. Novation will not be presumed. The intention to make a novation must clearly result from the terms of the agreement. C. C. 2186.
Czarnowski v. *Czarnowski*, 9.

2. An order written by the maker on the back of a promissory note, while in the hands of an endorsee to whom it has been transferred after maturity, requesting a third person to pay the note on a day named, is a mere indication by the debtor of a person who is to pay in his place, and does not operate a novation of the debt. On the failure of the person indicated to pay, the maker will be responsible. C. C. 2188, 2190. *Muggah* v. *Rogers*, 511.

OFFENCES AND QUASI-OFFENCES.

1. Where a sequestration has been illegally issued, the true standard of damages is the probable loss sustained by the defendant in consequence of having been deprived of the free use or disposal of his property. He should be placed as nearly as possible in the situation he would have been in, had the sequestration not been issued. *Sellick* v. *Kelly*, 145.

2. Defendants having attached certain bank bonds and notes belonging to plaintiff, and having recovered judgment in the court below, caused them to be sold under a *fi. fa.* The judgment was reversed on a devolutive appeal. Plaintiffs, in an action for damages for the illegal attachment, having proved that the bonds and notes had fallen in value pending the seizure, and that they were sold for much less than they might have been sold for had no attachment been issued: *Held*, that the defendants should pay the actual damages caused by their attachment. *Horn* v. *Bayard*, 259.

3. A sale of the contents of a coffee-house or shop, by notarial act, accompanied by delivery, cannot be treated as a nullity; and where a *fi. fa.* is levied on the property as still belonging to the vendor, the plaintiff in execution will be responsible to the purchaser in damages. But where no serious injury is shown to have been sustained by the plaintiff, and defendant acted without malice, the damages will be nominal only. *Presas* v. *Lanata*, 288.

4. In an action by plaintiffs against defendants for a trespass on their lands, by cutting timber, etc., it was proved that defendant had purchased timber from persons who had settled on the land claimed by plaintiffs, and been left in quiet possession. There was no evidence that they were informed of plaintiffs' title, nor was there any knowledge of it brought home to defendant. The sale by which plaintiffs acquired their title, did not appear to have been recorded in the parish in which the land was situated: *Held*, that there must be judgment for the defendant. *Banks* v. *Doughty*, 483.

OPPOSITION OF THIRD PERSONS.

Where the proceeds of property seized and sold under a *fi. fa.* are claimed in virtue of a previous seizure under a *fi. fa.*, the claimant must oppose, by way of third opposition, the application of the proceeds to the satisfaction of the second execution. C. P. 396, 397, 401, 402.

Sheldon v. *New Orleans Canal and Banking Company*, 181.

PARAPHERNAL PROPERTY.

See HUSBAND AND WIFE, 7, 10, 11.

PARTIES.

See EVIDENCE, 49, 50. PLEADING, I.

PARTNERSHIP.

1. Where, in an action for the settlement of partnership accounts, the defendant, in whose hands the books, accounts, and evidences of debts due to the firm remained at the time of its dissolution, is proved to have admitted that there were outstanding debts due the partnership to a certain amount, and he states in his answer that he will file a list of them, but omits to do so, and shows no diligence in collecting them, judgment will be given against him for a sum equal to the plaintiff's share in the debts due to the partnership at the time of its dissolution. *Cazeau* v. *Faget*, 10.

2. After the dissolution of a partnership, no one of the partners can use the social name so as to bind the rest. To draw or endorse a note in the name of the partnership, the authority must be express and special.

Carr v. *Woods*, 95.

3. One who has paid in consequence of his endorsement given to the liquidating partners after the dissolution of the partnership, cannot, as endorser, recover of the other partners on the note thus paid by him, although the consideration of the note was a debt due by the firm; nor can he recover on an account, stating such payment as an item. He might recover on showing that he had paid a debt due before the dissolution of the partnership, to the extent to which the partnership had profited by the payment. *Ibid.*

4. Where one person furnishes the funds to purchase an article, and another his credit, skill, and industry in preparing it for sale, in order that a profit may be made for their mutual benefit, it will constitute a partnership.

Bank of Tennessee v. *McKeage*, 130.

5. Whoever shares in the profits of a partnership is a partner, and as such reponsible for its debts, though his name be not in the firm. *Ib.*

6. Partnership property is liable to the creditors of the partnership in preference to those of the individual partner. C. C. 2794. *Ib.*

7. The share of a member of a partnership may be seized and sold to satisfy his individual creditors, subject to the debts of the partnership; and such seizure, if legal, operates a dissolution of the partnership. C. C. 2794. But a creditor of one partner cannot seize under execution, or attach any particular thing or piece of property belonging to the partnership, nor any portion of it, to satisfy

his debt. The whole share or interest of the indebted partner in the partnership must be seized or attached, when the partnership will be dissolved, and the creditor entitled to satisfaction out of the share of his debtor, after payment of the partnership debts. The interest of a partner is a distinct thing, and must be taken as a whole. *Ib.*

8. A District Court has jurisdiction of an action by the executor of a deceased partner against the survivor, for a settlement of the partnership accounts. *Thomson* v. *Mylne*, 349.

9. A balance due by the succession of one of the members of a particular partnership to his co-partner, for the price of his share in a plantation cultivated by them in partnership, is not a partnership debt to be satisfied out of the partnership property. The survivor is not a creditor of the partnership, but of his deceased partner. *Ib.*

10. After the dissolution of a partnership, no one of the partners can bind the others by the use of the social name, nor by any acknowledgment of a debt or or account. *Dupré* v. *Richard*, 497.

PLEADING.

I. *Parties to Actions.*
II. *Actions, Where to be brought.*
III. *Of the Petition.*
IV. *Exceptions and Answer.*
V. *Demands in Compensation and Reconvention.*
VI. *Intervention.*
VII. *Admissions.*
VIII. *Interrogatories to a Party.*
IX. *Proceedings against an Attorney at Law to Cancel his License.*

I. *Parties to Actions.*

1. An heir cannot be effected by any claim of an executor, unless personally cited to contest it. *Baldwin* v. *Carleton*, 109.

2. A minor heir is not legally represented by his tutor, on an application for the homologation of the accounts of the executors, where the tutor, as one of the executors, claims, with his co-executor, a sum for commissions on the estate of the deceased. The minor should have been represented by his undertutor, or the homologation of the accounts of the executors will not form *res judicata* as to him. *Ib.*

3. A minor is not bound to resort to an appeal or action of nullity, to protect himself against a judgment rendered against him when not legally represented. Such a judgment must be considered as one rendered without parties, and absolutely void. *Ib.*

4. In joint demands one of the creditors cannot represent the debtor. *Ib.*

5. A Recorder of Mortgages cannot be compelled to erase a mortgage without

making the mortgagee a party to the proceedings, unless a judgment ordering the erasure has been rendered contradictorily with the latter.

Delavigne v. *Gaiennié*, 171.

6. Action by certain creditors of a company against the commissioners appointed for the liquidation of its affairs, claiming a privilege on its property, and praying that it may be sold for the payment of their debts. It appeared from different acts of the legislature, that the State claimed a privilege on the property of the company, and to have subsequently become, by a forfeiture, declared by an act of the legislature, the actual owners of the property, which act directed the treasurer of the State to sell the same. No citation or other notice of the proceedings was given to the governor, treasurer, attorney general, or district attorney, but judgment was rendered declaring the act pronouncing the forfeiture unconstitutional, the State not to be the owner of the property, and ordering it to be sold by the commissioners, reserving, for a future decision, the question of the privileges of the different creditors. On appeal: *Held*, that the State not having been cited, nor notified of the proceedings, the judgment must be reversed, and the case remanded for a new trial, after the State shall have been notified through the proper officers.

Perry v. *Commissioners of Clinton and Port Hudson Railroad Company*, 404.

7. The defendant in an action of boundary cannot, under the allegation that, if the boundary claimed by plaintiff be established, his own boundaries will be so altered as to include land held by third persons, claim to have them made parties to the suit. *Per Curiam:* The defendant had no right to call his vendors in warranty; the plaintiff did not seek to evict him from any land sold to him, but only to establish that he had improperly changed his boundaries.

Duplessis v. *Lastrapes*, 451.

8. A minor canot sue in his own name, but only in the name of his tutor, duly qualified to act as such. *Per Curiam:* A judgment would not be *res judicata* as to the minor, unless it appeared that the person assuming to represent him was duly qualified. Nor would the defect be cured by suing in his name, assisted by his father. *Mayes* v. *Smith*, 563.

9. As a general rule, a purchaser who has been evicted can sue only his immediate warrantor. There is an exception to this rule, where the purchaser has been subrogated by the vendor to his action of warranty.

Smith v. *Wilson*, 522.

II. *Actions, Where to be brought.*

10. An action of revendication of real property may be instituted before the court within whose jurisdiction the property is situated, though the domicil of the defendant be in another district, or before the court of his domicil, at the option of the plaintiff. C. P. 163.

Second Municipality of New Orleans v. *Garland*, 387.

III. *Of the Petition.*

11. A plaintiff may set forth in his petition different grounds upon which he expects to recover, provided he do not make demands one of which necessarily excludes the other. C. P. 149. *Montross* v. *Hillman*, 87.

12. One who has paid in consequence of his endorsement, given to the liqui-

dating partners after the dissolution of the partnership, cannot, as endorser, recover of the other partners on the note thus paid by him, although the consideration of the note was a debt due by the firm; nor can he recover on an account, stating such payment as an item. He might recover on showing that he had paid a debt due before the dissolution of the partnership, to the extent to which the partnership had profited by the payment.

Carr v. *Woods*, 95.

13. Plaintiffs having advanced to defendant a certain sum on merchandise consigned to their house in another city, defendant drew a bill on the consignees, in their favor, for the amount advanced. The proceeds of the shipment falling short of the advance, plaintiffs sued for the difference, on an account debiting defendant with the amount of the bill, and crediting him with the nett proceeds of the sale. On an objection that the action should have been on the bill: *Held*, that the suit was properly brought. *Hewitt* v. *Sloan*, 281.

14. Where factors accept and pay a draft drawn on them, and charge it to the drawer in their account current, with a commission for making the advance, they cannot separate the draft from the account, and sue on it alone.

Dubose v. *O'Bryan*, 514.

IV. *Exceptions and Answer.*

15. After a judgment by default, no dilatory plea can be received.

Young v. *Patterson*, 7.

16. An exception that the petition contains contradictory allegations, and that plaintiffs cannot proceed without selecting the ground of their action, relates to the substance, not to the form of the action, and may be pleaded at any time before judgment. C. C. 344, 345. *Montross* v. *Hillman*, 87.

17. A defendant in a petitory action may defend himself by setting up title in a third person. *Choppin* v. *Michel*, 233.

18. Where a petitioner alleges that defendants are indebted to him in a certain sum, for which he had recovered judgment against them in another State, and prays that they may be cited to answer, for judgment, and for an attachment, and he subsequently obtains an order rendering the foreign judgment executory in this State, he may have the latter order annulled, on motion, *ex parte*; and where defendants appear and answer to the merits, without excepting to the previous proceedings, any irregularities will be considered as waived.

Hazard v. *Agricultural Bank of Mississippi*, 326.

19. Where a party excepts to the jurisdiction of the court, but proceeds to trial without asking for judgment on his exception, it will be presumed to have been waived. *Thomas* v. *Clement—Re-hearing*, 402.

20. Under no circumstances can a supplemental answer be permitted to be filed, after the evidence has been concluded.

United States v. *Bank of the United States*, 418.

21. Want of jurisdiction, *ratione personæ*, cannot be pleaded by a party who has voluntarily submitted to the jurisdiction of the court. *Ib.*

22. Where a defendant in an action commenced by injunction, excepts to answering to the merits, on the ground that the oath taken and the bond given to obtain the injunction, were taken and executed by one claiming to act as the

attorney in fact of the plaintiff, though no copy of the power was annexed to the petition, the power must be produced, or the action will be dismissed. C. C. 320. *Mayes* v. *Smith*, 503.

V. *Demands in Compensation and Reconvention.*

23. A plea of compensation is in the nature of a demand, and should be accompanied with a specification of the particular amount expected to be compensated, of the manner in which the party who claims the benefit of it acquired a right thereto, and with every circumstance of time and place which ought to be given in other demands. *Wilcox* v. *His Creditors*, 346.

See COURTS 8.

VI. *Intervention.*

24. The creditors of one who had commenced an action against a succession, claiming to have been the husband of the deceased, and to be entitled, as such, to one half of the property in her possession at the time of her death as community property, may intervene and prosecute the claim, where they apprehend that the plaintiff is about to abandon it for the purpose of defrauding them. C. C. 1985. *Succession of Baum*, 314.

25. An action having been commenced by a party to cause himself to be recognised as the husband of the deceased, claiming his portion of certain property as having belonged to the community, his creditors intervened, praying to be allowed to prosecute the suit, on the ground that plaintiff was about to abandon it for the purpose of defrauding them. A supplemental intervention was subsequently filed by the same parties, alleging that, since the date of their intervention, they had purchased all the rights of the plaintiff in the action, and praying to be allowed to prosecute it to a decision. On an exception that the supplemental intervention set up a new cause of action, and was therefore inadmissible: *Held*, that the supplemental intervention does not in any manner change the substance of the original demand that the plaintiff be recognised as the husband of the deceased, but merely the parties to the proceedings, and that it should be received. C. P. 364. *Ib.*

26. The law authorises those whose interests may be effected by an action pending between others, to intervene, and join one of the parties, or oppose both; but they cannot be compelled to do so. C. P. 389, 390. Act 7 April, 1826, s. 10. They may institute a separate action against either, or both of the parties litigant. C. P. 391. But should any of their rights be lost or impaired, in consequence of their neglect or failure to intervene, after notice of the proceedings likely to affect them, they must bear the consequences.

Hazard v. *Agricultural Bank of Mississippi*, 326.

27. A garnishee is but a stakeholder; he has nothing to do, but to take care of himself. He cannot interfere between the plaintiff and defendant, nor others claiming what he holds or owns, but must pay to whomsoever the court may order him. *Ib.*

VII. *Admissions.*

28. A non-resident may appeal at any time within two years from the day on which final judgment was rendered (C. P. 593); and where the plaintiff

allege in their petition and affidavit for an attachment, that the defendants reside out of the State, they will be concluded thereby.

Krœutler v. *Bank of United States*, 213.

VIII. *Interrogatories to a Party.*

29. Where, in answer to an interrogatory, a party states facts not necessarily connected with that as to which he was interrogated, such irrelevant matter will be struck out, on motion. *Smith* v. *Richardson*, 516.

IX. *Proceedings against an Attorney at Law to Cancel his License.*

30. The license of an attorney at law cannot be withdrawn or annulled, unless on *conviction* in the manner prescribed by the act of 27 March, 1823. The proceedings must be by information before the District Court of the domicil of the accused; and there must be a trial by jury. Act 31 March, 1808, s. 6. 27 March, 1823, s. 3. 22 March, 1826, s. 1. *Chevalon* v. *Schmidt*, 91.

POSSESSION.

Where the vendor and vendee of an immovable reside in the same house, possession follows title. *Wederstrandt* v. *Marsh*, 533.

See PRESCRIPTION, 1, 2, 14, 15.

PRESCRIPTION.

1. It is only after an uninterrupted possession of three successive years, that one who purchased a thing stolen or lost, at public auction, or from a person in the habit of selling such things, can demand the price he paid for it of the rightful owner, who claims the property. C. C. 3472, 3473, 3474.

Campbell v. *Nichols*, 16.

2. To make out a title by prescription, such as will authorise a recovery in a petitiory action, where possession has been decreed to be in the other party, plaintiffs must, at least, show clearly that, before possession was decreed to their adversary, they held peaceable, public, continuous, uninterrupted and unequivocal possession, a sufficient length of time, under a just title, with proof of the exact commencement of that possession. C. C. 3452, 3453.

Prevost v. *Ellis*, 56.

3. One employed to superintend draymen, and to keep the accounts and make out the bills of his employer, is neither a *workman*, *laborer*, nor *servant*, within the meaning of art. 3499 of the Civil Code. The word *servant* in that article means a menial servant. The prescription applicable to the claim of one employed as such superintendent or clerk, is that of three years, established by art. 3503. *Keaghey* v. *Barnes*, 139.

4. The curator of a succession credited himself in his account with a sum, exceeding the amount of the assets of the succession in his hands, which he claimed in consequence of eviction from land sold to him by the deceased. On the opposition of the heirs it was decided, that the claim of the curator, so far as it exceeded the assets in his hands, was prescribed, and judgment was rendered allowing his claim to the amount of such assets. On appeal: *Held*,

that the claim was an entire one, arising from the same cause, and could not be prescribed in part; and that the account should be homologated.

Succession of Durnford, 183.

5. Where plaintiffs, having failed in obtaining their evidence in time for a trial urged by the opposite party, were unable to make out their case, and the court ordered a dismissal as in case of non-suit, they will not be regarded as having abandoned the suit within the meaning of art. 3485 of the Civil Code, which declares that where a plaintiff abandons, or discontinues his case, prescription shall be considered as not having been interrupted thereby.

Dunn v. *Kenney*, 249.

6. Excessive or inofficious donations—actions for the reduction of which are prescribed by five years, where the person entitled to exercise them is in the State, and by ten years if out of it, under art. 3507 of the Civil Code, are those dispositions which fathers and mothers, or other ascendants make of their property to the prejudice of their descendants, beyond the proportion reserved to them by law. C. C. 3522, s. 21. *Lagrange* v. *Barré*, 302.

7. An action to annul a donation *inter vivos*, in consequence of the donor's not having reserved property enough for his subsistence, is not prescribed by five years. From considerations of public order, such a donation is declared, by art. 1484 of the Civil Code, to be absolutely null. *Ib.*

8. Plaintiff having commenced an action against a succession to cause himself to be acknowledged as the husband of the deceased, neglected for more than three years to take any steps in it, when certain creditors intervened, praying to be allowed to prosecute the action on the ground that the plaintiff was about to abandon it for the purpose of defrauding them. The latter subsequently attempted to discontinue, but his motion was overruled. *Held*, that the prescription of one year established by art. 1989 of the Civil Code is inapplicable to the claim of the intervenors, who do not seek to revoke any contract or act of any kind, but simply to intervene in an action for the protection of their rights. *Succession of Baum*, 314.

9. Prescription is interrupted by a *cessio bonorum* made by the debtor.

Wilcox v. *His Creditors*, 346.

10. Prescription runs against a vendee's action of warranty from the date of the eviction, and not from that of the sale.

Thomas v. *Clement—Re-hearing*, 403.

11. A plaintiff who holds under an act of sale which expressly declares that the vendor sells only such rights as he has to the property, and that the vendee has a knowledge of his title thereto, has not acquired such a just title, translative of property, as will serve as a basis for the prescription of ten years.

Avery v. *Allain*, 436.

12. An endorsement of a partial payment, in the hand writing of the holder of the note, without other proof that a payment was made at the date mentioned in the endorsement, is insufficient to interrupt prescription.

Splane v. *Daniel*, 449.

13. A memorandum at the bottom of an account rendered by plaintiff's tutor, in 1828, stated that there was a note belonging to the estate of the minor, deposited in the office of the parish judge, which, when collected, would be

accounted for. A further account was rendered in July, 1834, not including any part of the proceeds of the note, nor alluding to it, and the minor, who was emancipated by marriage, assisted by her husband, a few days after gave the tutor a receipt for the full amount coming to her, and a complete discharge. In February, 1844, plaintiff sued the heirs of the tutor, to recover her share of the proceeds of the note: *Held*, that the action was prescribed by art. 356 of the Civil Code. *Offutt* v. *Collins*, 491.

14. The *just title* required to enable a possessor to acquire property in a slave by the prescription of five years where the parties are present, and by ten years between absentees, must be one derived from a person whom the possessor honestly believed to be the real owner: and it must be such as would, in its nature, suffice to transfer the property, if derived from the real owner. C. C. 3437, 3439, 3450, 3451. *Sandoz* v. *Gary*, 529.

15. A slave may be acquired by the prescription of fifteen years without any title on the part of the possessor, and whether he be in good faith or not, and this prescription runs against absentees as well as residents; but the possession must be continuous, uninterrupted, public, unequivocal, and *animo domini*. C. C. 3465, 3466. *Ib*,

PRESUMPTION.

See EVIDENCE, II. PLEADING, 19.

PRIVILEGE.

1. Property surrendered by an insolvent, subject to a mortgage, having been sold by his syndic, was purchased by the mortgage creditor, and the price retained in satisfaction of his claim. Bond was given by the creditor, with surety, for any amount which he might ultimately have to contribute towards the payment of the privileged expenses of the estate; but no mortgage was reserved on the syndic's sale, nor was it recorded in the office of the Recorder of Mortgages. The property was afterwards sold by the purchaser to a third person, to whom a certificate was delivered from the Recorder of Mortgages, showing that the property was clear of incumbrance. On a rule on the second purchaser, to show cause why the property in his hands should not be sold to satisfy the contribution due by his vendor, the mortgage creditor, for the privileged expenses of the estate: *Held*, that the defendant in the rule not being aware that his vendor was bound to pay any part of the price of the property as a contribution for privileged expenses, and neither the act of sale nor the *procès-verbal* of the adjudication having been recorded, and no mortgage or privilege reserved by the syndic, he could be made liable only in case of having expressly assumed the payment of the contribution. Rule discharged. C. C. 3238, 3314, 3317. *Duplessis* v. *His Creditors*. 4.

2. Law charges are the costs incurred in court in the prosecution of a suit, to be paid by the party cast. Such costs, when taxed according to law, are privileged against the insolvent's estate, whether incurred previously to the insolvency, or in the *concurso*. C. C. 3162, 3163.

Barkley v. *His Creditors*, 28.

3. The costs of the proceedings incurred in establishing a charge of fraud against an insolvent, are included among the law charges privileged against the estate. *Barkley* v. *His Creditors*, 28.

4. Plaintiffs having sold to defendant a quantity of cotton, delivered it to him on receiving only a part of the price. The purchaser shipped the cotton, consigning it to a house of which the intervenor was a member, for sale on account of the shipper; and, in consequence of advances made by the intervenor, had the bill of lading made out in the name of the latter. Plaintiffs having sued to recover the balance of the price, sequestered the cotton; and the party who had made the advances intervened, claiming a privilege on its proceeds. *Held*, that by delivering the cotton before payment in full, the vendors authorised defendant to consider himself its absolute owner; that by suffering the intervenor to take the bill of lading in his name, defendant gave him the same right to the cotton from the date of the bill, as if he had endorsed to him a bill of lading filled up in defendant's own name, which would transfer the property; that the privilege of the vendor, under art. 3194 of the Civil Code, exists only so long as the property remains in possession of the purchaser; and that under art. 3214 of the Civil Code, the intervenor was entitled to a privilege on the proceeds of the cotton, for the advances made by him.

Laughlin v. *Ganahl*, 140.

5. Permission to occupy certain premises, without pay, on condition of leaving whenever required by the owner to do so, does not give rise to the relation of landlord and tenant between the parties, nor invest the owner with the lessor's lien or privilege, or right of sequestration. A stipulation for rent is of the essence of the contract of lease. *Fisk* v. *Moores*, 279.

6. Liens and privileges are *stricti juris*, and exist only where they have been expressly given by law. C. C. 3152. *Ib.*

7. The seizure under a *fi. fa.* of the interest of a debtor in notes, entitles the seizing creditor to be paid by preference out of the proceeds.

Lafleur v. *Hardy*, 493.

PROVISIONAL SEIZURE.

Property, provisionally seized, having been released on the execution of a bond with surety, plaintiff obtained judgment, and issued a *fi. fa.*, which was returned "no property found after demand of the parties." On a rule against the surety, to show cause why execution should not be issued against him, the latter introduced a witness who stated that he had notified plaintiff and the sheriff, that the property originally seized was within the jurisdiction of the court, and requested him to seize it, informing him where it was. *Held:* That the rule should be made absolute. *Walden* v. *Philips*, 123.

QUASI-CONTRACTS

1. Where proceedings instituted by one of the Municipalities of New Orleans, under the act of 3 April, 1832, regulating the opening and improving of streets and public places, have been discontinued before any final confirmation by the court of the report of the assessors, the owners of property required for the improvement, and assessed at a certain price, cannot claim the amount on the

ground of an implied sale, though the Municipality have taken possession of the premises. *Per Curiam:* The proceedings not having been perfected, the parties can claim no rights under them; the plaintiffs can only demand the premises, or damages for the injury resulting from having been deprived of them. *Hullin* v. *Second Municipality of New Orleans*, 97.

2. Money paid through error, the debt having been previously satisfied, may be recovered back. C. C. 2129, 2280. *Beasley* v. *Allen*, 502.

QUASI-OFFENCES.

See OFFENCES AND QUASI-OFFENCES.

RECEIVER.

See SEQUESTRATION, 3.

RECONVENTION

See SUCCESSIONS, 9.

REGISTRY.

1. Where a mortgage on slaves has been recorded in the mortgage office of the place where the debtor had his domicil or usual place of residence at the time of the inscription, it becomes a vested right (C. C. 3318), and cannot be destroyed by any act of the mortgagor, nor of third persons. Consequently, where the mortgagor subsequently acquired a domicil in another parish, a reinscription in the parish to which the debtor removes, is not necessary to preserve the mortgage. *Commissioners of New Orleans Improvement and Banking Company* v. *Jewett*, 20.

2. The seventh section of the act of 25 March, 1810, requiring notarial acts concerning immovable property to be recorded in the office of the parish judge where the property is situated, was not repealed by the promulgation of the Civil Code. Under that act, contracts of sale of real property, not recorded, are void as to third persons. *Prevost* v. *Ellis*, 56.

3. Though a contract by which a party alleges that he sells, and actually delivers certain lands and slaves to his endorsers, to be held by them until indemnified for their endorsements, reserving a right to redeem the slaves on discharging the endorsers from any liability, be decided by the Supreme Court to be a mortgage and not a sale, it must be duly recorded to entitle the endorsers to the privilege of hypothecary creditors, as against other creditors having mortgages regularly registered. *Succession of Hutchings*, 512.

SALE.

I. *Requisites and Proof of Sale, and Effect thereof.*
II. *Privilege of Vendor.*
III. *Warranty and Eviction.*
IV. *Recission.*
V. *Judicial and other Public Sales.*

I. *Requisites and Proof of Sale, and Effect thereof.*

1. Plaintiff caused a carriage to be sent to his factors, to be forwarded to him when ordered. They sent it to a dealer in such articles, with instructions to sell it, and he sold it, at private sale, to defendant. It was not proved that the latter knew of the want of authority in the vendors. In an action against the purchaser to recover the carriage, or its value: *Held*, that the defendant acquired no right to the carriage, his vendors having none, nor any authority to convey any; and that the sale was null. C. C. 2427.

Campbell v. *Nichols*, 16.

2. The seventh section of the act of 25 March, 1810, requiring notarial acts concerning immovable property to be recorded in the office of the parish judge where the property is situated, was not repealed by the promulgation of the Civil Code. Under that act, contracts of sale of real property, not recorded, are void as to third persons. *Prevost* v. *Ellis*, 56.

3. Proof, by a subscribing witness, that an act of sale of real property *sous seing privé*, was signed and executed on the day of its date, is insufficient to give it effect from its date, as to third persons. Parol evidence is admissible only to prove the date of the act, as between the parties. *Ib.*

4. An act of sale of lands, passed in 1774 before a Spanish commandant in Louisiana, in the presence of two witnesses, which recites that the vendor did not sign it because he could not write, and that the title was delivered to the vendee who took immediate possession, and which had remained among the notarial records of the parish, is admissible in evidence to prove a title to the property. *Per Curiam:* The act would have been sufficient evidence of title under the Spanish law, which permitted parol sales of immovables; it has all the requisites of an authentic act; and the absence of the vendor's signature is sufficiently accounted for by the public officer who received it, the ordinary mark of a party to an authentic act not being required at that period.

Choppin v. *Michel*, 233.

5. Parol evidence is inadmissible to prove that a slave sold by defendant to plaintiff, was represented as possessing certain qualifications not mentioned in the act of sale. *Milliken* v. *Andrews*, 241.

6. Parol evidence is inadmissible to alter, modify, or contradict a written act of transfer of immovables or slaves, or to prove any agreement or stipulation beyond its contents, where there is no allegation of fraud, error or violence. C. C. 2256. But such evidence is admissible to prove that the adjudication price of real estate sold at auction, was paid to a creditor holding a mortgage on the property, and the manner of such payment. *Macarty* v. *Gasquet*, 270.

7. A purchaser of real estate cannot be affected by any agreement respecting its sale, made between his vendors and a former owner of the property, which was unknown to him at the time of the purchase, and not registered.

Lanfear v. *Hunt*, 284.

8. A sale of the contents of a coffee-house, or shop, by notarial act, accompanied by delivery, cannot be treated as a nullity; and where a *fi. fa.* is levied on the property as still belonging to the vendor, the plaintiff in execution will be responsible to the purchaser in damages. But where no serious injury is shown

to have been sustained by the plaintiff, and defendant acted without malice, the damages will be nominal only. *Presas* v. *Lanata*, 288.

9. One who has effected insurance on his life may assign the policy, or a part of it, to a *bona fide* creditor; but such an assignment will be without effect as to third persons, creditors of the insured, where there was no proof of notice to the assurers before the death of the assured, nor of the acceptance of the assignment by the transferree before that date, and the policy remained in the possession of the assignor. C. C. 1804, 2612, 2613.

Succession of Risley, 293.

10. The assignor of a debt is not divested of title, as to third persons, before notice to the debtor; till then the assignee has but an inchoate right. C. C. 2613. *Ib.*

11. Where a debt due to defendants by a note secured by mortgage, had been transferred to third persons by a notarial act recorded in the office of the parish judge, but, before notice of the transfer was given to the maker of the note, the debt was attached by a creditor of defendants, the attaching creditor will be entitled to be paid by preference out of the proceeds.

Hazard v. *Agricultural Bank of Mississippi*, 326.

12. By an act *sous seing privé*, signed by both parties, registered, on proof by a witness of the signatures of the parties, in a notary's office, and subsequently recorded in the office of the parish judge of the parish in which the land was situated, D. & Co. agreed to sell to the plaintiff one third of a plantation, with the slaves, etc. thereon, for a certain sum, payable in seven yearly instalments, the latter binding himself, should any amount remain unpaid at the end of the seven years, to give a special mortgage on the property, for such balance, with interest from that time. The contract stipulated, that the plaintiff should reside on the plantation, and manage it for a fixed salary; that the supplies should be furnished by D. & Co., and the crops sold by them, and that the proceeds of the sales, after deducting expenses, should be considered the annual product of the plantation, one third of which should be placed to the credit of the plaintiff; that the contract should continue for seven years, renewable if agreeable to all parties, but if a dissolution should take place, the value of the property to be fixed for settlement by mutual appraisement, or by public sale; that plaintiff should pay one third of what may be expended on certain proposed improvements, with interest, from the date of the advance by D. & Co. of the necessary sum, until plaintiff's share be paid; and that "the agreement should be regularly completed before a notary as soon as possible." *Held*, that the act was not merely a promise to sell, but an absolute sale, which vested the ownership of one third of the plantation, slaves, etc., in the plaintiff, from its date, the vendors becoming his creditors for the price; that the term of seven years was stipulated only in reference to the duration of the partnership; and that the declaration that the agreement should be completed as soon as possible before a notary, was not an essential condition of the contract, but a mere provision for securing regular evidence of the convention.

Thomson v. *Mylne*, 349.

13. A sale is complete between the parties as soon as there exists an agreement for the object and the price, though the object be not yet delivered, nor the

price paid. C. C. 2414, 2431. And such a sale has effect against third persons from the date of its registry in the office of a notary, and the actual delivery of the thing sold. C. C. 2242, 2417. *Thomson* v. *Mylne*, 349.

14. A promise to sell amounts to a sale where there exists a reciprocal consent of both parties, as to the thing and the price. C. C. 2437. *Ib.*

15. A plaintiff who holds under an act of sale which expressly declares that the vendor sells only such rights as he has to the property, and that the vendee has a knowledge of his title thereto, has not acquired such a just title translative of property, as will serve as a basis for the prescription of ten years. *Avery* v. *Allain*, 436.

16. Plaintiff having purchased a slave from a third person, transferred to the latter in payment of the price a part of a twelve-month's bond. In taking out execution on the bond, plaintiff's attorney, by mistake, ordered the clerk to credit the execution with the amount of the part of the bond so transferred. The balance due on the bond having been collected by the sheriff, the transferree claimed to be paid the amount transferred to him out of the sum in the hands of the sheriff, in preference to the plaintiff: *Held*, that the transferree cannot be prejudiced by the mistake of the plaintiff's attorney, and is entitled to the amount claimed. *Garrett* v. *Morgan*, 447.

17. Action to recover certain slaves purchased by defendant from a third person, in whose possession they were at the time of the sale. It was proved that they had been brought into this State by the vendor as the administrator of the succession of plaintiff's ancestor, and had remained in his possession several years; that they had been seized under execution as the property of the vendor, and offered for sale, but were not sold in consequence of the general notoriety of the fact, that they were not the property of the party in whose hands they were seized; and that defendant was present when they were offered for sale, probably with a view to bid for them: *Held*, that the facts warrant the presumption that the defendant was aware of the defect in the title of his vendor. Judgment for the plaintiffs. *Jenkins* v. *Theriot*, 450.

18. In an action by plaintiffs against defendant for a trespass on their lands, by cutting timber, etc., it was proved that defendant had purchased timber from persons who had settled on the land claimed by plaintiffs and been left in quiet possession. There was no evidence that they were informed of plaintiffs' title, nor was there any knowledge of it brought home to defendant. The sale by which plaintiffs acquired their title did not appear to have been recorded in the parish in which the land was situated: *Held*, that there must be judgment for the defendant. *Banks* v. *Doughty*, 483.

19. Action by a wife for a separation of property, claiming a slave as paraphernal, and opposition by the creditors of the community. Plaintiff offered in evidence a notarial act of sale of the slave, in which the vendor acknowledged the receipt of a sum of money from the plaintiff, as the price. Plaintiff then offered parol evidence to prove that the transaction was in fact a *dation en payement*, and that the slave was given to plaintiff by her mother, as an advance upon her inheritance: *Held*, that the evidence was admissible to prove that the slave was acquired by the funds of the wife, and that, in this respect, it does not contradict the notarial act. *Gonor* v. *Her Husband*, 526.

20. Where the vendor and vendee of an immovable reside in the same house possession follows title. *Wederstrandt* v. *Marsh*, 533.

See 21, 34, *infra.*

II. *Privilege of Vendor.*

21. Plaintiffs having sold to defendant a quantity of cotton, delivered it to him on receiving only a part of the price. The purchaser shipped the cotton, consigning it to a house of which the intervenor was a member, for sale on account of the shipper; and, in consequences of advances made by the intervenor, had the bill of lading made out in the name of the latter. Plaintiffs having sued to recover the balance of the price, sequestered the cotton: and the party who had made the advances intervened, claiming a privilege on its proceeds. *Held*, that by delivering the cotton before payment in full, the vendors authorised defendant to consider himself its absolute owner; that by suffering the intervenor to take the bill of lading in his name, defendant gave him the same right to the cotton from the date of the bill, as if he had endorsed to him a bill of lading filled up in defendant's own name, which would transfer the property; that the privilege of the vendor, under art. 3194 of the Civil Code, exists only so long as the property remains in the possession of the purchaser; and that under art. 3214 of the Civil Code, the intervenor was entitled to a privilege on the proceeds of the cotton, for the advances made by him.

Laughlin v. *Ganahl*, 140.

III. *Warranty and Eviction.*

22. The obligations of a warrantor depend upon the law in force at the time of the sale. *Succession of Durnford*, 183.

23. Under the Code of 1808, the vendor was bound, in case of eviction of the purchaser, to pay him, in addition to the price, &c. the increased value of the property at the date of the eviction, though the purchaser did not contribute to such increase. Book 3, tit. 6, arts. 54, 57. The orginal price, added to the rents and profits, does not necessarily constitute the measure by which the liability of the warrantor is to be ascertained; other things must be taken into consideration; and the general rule, that damages are to be measured by the loss actually sustained, and not by the gains of which the party has been deprived, is inapplicable. *Ib.*

24. Defendants sold to plaintiff a tract of land, at the rate of ten dollars an *arpent*. The act of sale provided that, "within a reasonable time from the day of sale, a survey and plan of said tract shall be made by a duly commissioned surveyor, which plan shall be recorded and made part of this act," and that in case of plaintiff's eviction from any part of the land, or of its being found by the survey to contain less than the quantity for which he paid, defendants shall refund to the purchaser at the rate of ten dollars for every *arpent* deficient. No survey was made under this stipulation; but by a new survey, made by the United States in consequence of alleged errors in the first, the lines of the tract sold to plaintiff were altered, and a large portion of the land declared to belong to the United States. Plaintiff knew of this second survey and location, which was approved by the Commissioner of the Land Office more than ten years after defendants' sale to him, but he made no opposition to the pro-

ceedings, nor notified his vendors. After the land had been declared public, plaintiff purchased it from the United States at $1 25 per acre, and immediately caused a survey to be made to ascertain the deficiency in the quantity purchased from defendants. In an action by plaintiff against defendants, claiming to be refunded at the rate of ten dollars an *arpent* for the deficiency: *Held*, that the stipulation to refund to the purchaser at that rate, must be confined to any deficiency ascertained by a survey made "within a reasonable time from the day of the sale;" that it was never contemplated to apply to an eviction occurring at a distant period—ten or eleven years after; that for such an eviction the vendee must be compensated for the damage actually sustained; and that the price paid by him to the United States for the land from which he was so evicted, is the measure of such damages.

Thomas v. *Clement*, 397.

25. To constitute an eviction it is not necessary that the purchaser should be actually dispossessed. It may take place where he continues to hold the property, if under a different title from that transferred to him by his vendor. *Ib.*

26. Prescription runs against a vendee's action of warranty from the date of the eviction, and not from that of the sale. *Thomas* v. *Clement—Re-hearing*, 402.

27. Where one, who sells all the rights, claims, or privileges he has or may have to a second concession in the rear of a front tract, without warranty, or stipulation to make a title, subsequently becomes the owner of part of the land in the rear, by purchase from a third person holding under another title, he may hold, against his vendee, the property thus acquired by him. *Per Curiam:* To hold him bound to make the title of his vendee good, would be to enforce a warranty of title, where none was intended to be given.

Avery v. *Allain*, 436.

28. As a general rule, a purchaser who has been evicted can sue only his immediate warrantor. There is an exception to this rule, where the purchaser has been subrogated by the vendor to his action of warranty.

Smith v. *Wilson*, 522.

29. Where a purchaser at a sheriff's sale sells the same property, and, in the act of sale, declares, that he thereby "subrogates the vendee to all the rights and privileges acquired by the sheriff's sale," the latter will be considered as subrogated to the action of warranty to which his vendor was entitled. *Ib.*

30. Where the vendee of a purchaser at a sheriff's sale, subrogated to the rights of the latter, is evicted by a mortgage creditor of the original debtor in execution, he will be entitled, under art. 711 of the Code of Practice, to an action of warranty against both the debtor and creditor in execution, for the reimbursement of the price paid by him; but upon the joint judgment, he must first take execution against the debtor, and, on its return no property found, may take out execution against the creditor. Art. 713 of the Code of Practice does not apply to such a case. *Per Curiam:* Both parties stand in the same position as if the eviction had taken place in consequence of a better title; and in equity each party is bound, to the extent to which he has profited by the sale, to refund to the purchaser who has been evicted. *Ib.*

31. The fact that a vendee of a purchaser at a sheriff's sale, subrogated to the

rights of his vendor, has recovered judgment against his vendor, on the ground of eviction, for the price paid, is no bar to an action by him against the debtor and creditor in the original execution, where the judgment so recovered has not been satisfied. *Smith* v. *Wilson*, 522.

IV. *Recission.*

32. Where one purchases property from an absconding debtor, with notice that his object in selling it was to deprive his creditors of their recourse upon it, and such purchase operates to their injury, it will be annulled. C. C. 1973. But the purchaser, though in bad faith, will be entitled to a restitution of so much of the consideration or price paid by him, as he shall prove to have enured to the benefit of the creditors, by adding to the amount applicable to the payment of their debts. C. C. 1977. *Barker* v. *Phillips*, 190.

33. To annul a sale on the ground of fraud, the creditor must prove the inability of the debtor to pay his debts, and injury to himself. *Per Curiam:* A contract, though made in bad faith, cannot be rescinded by creditors unless it operate to their injury. C. C. 1973. *Lafleur* v. *Hardy*, 493.

See 35 to 41 and 47 to 49, *infra.*

V. *Judicial and other Public Sales.*

34. Property surrendered by an insolvent, subject to a mortgage, having been sold by his syndic, was purchased by the mortgage creditor, and the price retained in satisfaction of his claim. Bond was given by the creditor, with surety, for any amount which he might ultimately have to contribute towards the payment of the priviled expenses of the estate; but no mortgage was reserved on the syndic's sale, nor was it recorded in the office of the Recorder of Mortgages. The property was afterwards sold by the purchaser to a third person, to whom a certificate was delivered from the Recorder of Mortgages, showing that the property was clear of incumbrance. On a rule on the second purchaser, to show cause why the property in his hands should not be sold to satisfy the contribution due by his vendor, the mortgage creditor, for the privileged expenses of the estate: *Held*, that the defendant in the rule not being aware that his vendor was bound to pay any part of the price of the property as a contribution for privileged expenses, and neither the act of sale nor the *procès-verbal* of the adjudication having been recorded, and no mortgage or privilege reserved by the syndic, he could be made liable only in case of having expressly assumed the payment of the contribution. Rule discharged. C. C. 3238, 3314, 3317. *Duplessis* v. *His Creditors*, 4.

35. It is only after an uninterrupted possession of three successive years, that one who purchased a thing stolen or lost, at public auction, or from a person in the habit of selling such things, can demand the price he paid for it of the rightful owner, who claims the property. C. C. 3472, 3473, 3474.
Campbell v. *Nichols*, 16.

36. An action before the Commercial Court to annul a sale made by the sheriff of a District Court, and exception that the former court cannot annul, or set aside the proceedings of the latter: *Held*, that so far as the judicial proceedings of the latter are concerned, the Commercial Court is without jurisdiction;

but where the executory proceedings of a sheriff are set up by defendants as the basis of their title, they may be examined, and set aside if illegal.

Mississippi Marine and Fire Insurance Company v. *Bank of Louisiana*, 47.

37. Where the notice of seizure under a *fi. fa.* is illegal, the sale will be set aside. *Ib.*

38. Where, after a seizure under a *fi. fa.*, the sheriff, on being enjoined from further proceedings, returns the writ into court, and under an *alias fi. fa.* proceeds to sell the property originally seized, without making any new seizure, the sale will be annulled. *Cochrane* v. *Bank of the United States*, 64.

39. The purchaser at a judicial sale, made under the orders of a Court of Probates, is not bound to look beyond the decree of the court recognising the necessity of the sale. He is bound to look to the jurisdiction of the court; but the truth of the record concerning matters within its jurisdiction, cannot be disputed. *Beale* v. *Walden*, 67.

40. In the alienation of the property of minors, the advice of a family meeting forms an essential part of the judgment or *basis* upon which it rests. Though the Civil Code does not expressly require that the family meeting shall be held in the parish in which the court sits, such must be considered as the true construction of all its provisions, taken together. C. C. 305, 308. Act 10 March, 1834, s. 1. *Ib.*

41. The act of 10 March, 1834, relative to the titles of purchasers at judicial sales, applied only to the actual and immediate purchaser at the judicial sale. The benefits of that act were extended to subsequent vendees, holding under the original purchaser at the judicial sale, by the act of 11 March, 1837. Consequently the homologation of the sale, on a monition sued out before the act of 1837, by one to whom an act of sale was executed, on an acknowledgment, at the foot of the *procès-verbal* of the auctioneer, made by the person to whom the property was adjudicated, that he had purchased the property for the former, will not cure any irregularities in the sale. *Ib.*

42. Art. 2622 of the Civil Code, which provides that one against whom a litigious right has been transferred, may release himself by paying to the transferree the real price of the transfer, with interest from its date, relates only to conventional assignments. It does not apply to a transfer resulting from a sheriff's sale under execution, the transferree acquiring all the rights of the owner of the right sold. C. P. 647, 690. *Succession of Tilghman*, 124.

43. The title of property sold at auction vests in the purchaser from the moment of the adjudication. C. C. 2586. *Macarty* v. *Gasquet*, 270.

44. Where one claiming under a *fi. fa.* produces the judgment, execution, sheriff's return thereon, and act of sale, it will be presumed that the formalities of the law have been complied with. It is for the other party to show that they have not been complied with. *Succession of Baum*, 314.

45. Where a purchaser of land at a sheriff's sale does not, at the time, exercise his right of requiring the sheriff to put him in possession, but permits a third person to occupy a part of the premises, he cannot afterwards, by a petition addressed to the judge of the court from which the execution was issued in chambers, obtain, in a summary way, an order directing the sheriff to put him in possession. *Bigler* v. *Brashear*, 500.

46 The provisions of arts. 334, 335, 337 of the Civil Code, relate to the sale of property belonging exclusively to minors, not to that of the property of successions, in the hands of an administrator, in which the heirs, whether minors or of age, have but a residuary interest, which can be ascertained only by a full administration. C. C. 1042, 1051. *Richard* v. *Deuel*, 508.

47. The nullity resulting from the adjudication of the property of minors at a price less than the appraisement, is a relative one, of which they alone can take advantage. *Per Curiam:* The formalities prescribed for the sale of property of minors are exclusively for their benefit. *Ib.*

48. A sheriff's sale will not be annulled at the suit of a creditor of the defendant in execution, unless it be shown that the former has been injured thereby. *Per Curiam:* Though the acts of a debtor be illegal and fraudulent, yet if they cause no damage to any one, they will not be annulled.
Wederstrandt v. *Marsh*, 533.

49. The nullity resulting from a failure to advertise a sheriff's sale for the time required by law, is not an absolute one, and does not of itself annul the sale. The advertisements may by waived bo the written consent of the parties. *Ib.*

50. Where a plantation is to be sold under execution, the debtor may require that the sale be made on the place itself. C. P. 665. *Ib.*

See 30, 31 *supra.*

SEQUESTRATION.

1. Under art. 275 of the Code of Practice, or under the 9th section of the act of 7 April, 1826, to obtain a sequestration, the applicant must make oath that he fears that the party having possession of the property may remove it beyond the limits of the State during the pendency of the suit. It is not any privilege or mortgage which the creditor has on the property, but the circumstance which causes him to apprehend that its removal may deprive him of his recourse upon it, that gives the right of sequestration. The requisites for obtaining a sequestration under the act of 1826, where the party has a lien or privilege on the property, are the same as under section 6 of art. 275 of the Code of Practice, in cases in which the creditor has a special mortgage. *Sellick* v. *Kelly*, 145.

2. Where a sequestration has been illegally issued, the true standard of damages is the probable loss sustained by the defendant in consequence of having been deprived of the free use or disposal of his property. He should be placed as nearly as possible in the situation he would have been in, had the sequestration not been issued. *Ib.*

3. The law designates who the judicial sequestrator shall be, and the court cannot appoint another, unless by consent of parties. The parties to an action may select their own agents, and confer on them such powers as they think proper; but the court can impose no burdens or restrictions on such agents, not imposed by their principals. *United States* v. *Bank of United States*, 418.

SHERIFF.

A sheriff is the agent of the plaintiff in execution only so far as he derives authority from the writ placed in his hands. The moment it is returned into court, his authority ceases. *Raboteau* v. *Valeton*, 218.

SUBROGATION.

1. One who has loaned money to an insolvent, before his surrender, for the purpose of satisfying a judgment obtained against him, should prove the loan and subrogation and the receipt of the money by the judgment creditor, by a notarial act. C. C. 2156 § 2. But where the loan and subrogation were proved by autentic act, and parol evidence was admitted in the lower court, without objection, to establish the payment to the creditor, it will be too late to object to the nature of the proof of payment, after appeal.

Wilcox v. *His Creditors*, 346.

2. Where a purchaser at a sheriff's sale sells the same property, and, in the act of sale, declares, that he thereby "subrogates the vendee to all the rights and privileges acquired by the sheriff's sale," the latter will be considered as subrogated to the action of warranty to which his vendor was entitled.

Smith v. *Wilson*, 522.

STATUTES, CITED, EXPOUNDED, &c.

I. *Statutes of the United States.*

II. *Statutes of the State.*

III. *Statutes of Pennsylvania.*

I. *Statutes of the United States.*

1790, May 26. Authentication of Judicial Proceedings. *United States* v. *Bank of the United States*, 418.

1799, March 2, ss. 2, 4. Compensation of Collectors of Customs. *Prieur* v. *Morgan*, 292.

1804, —— 27. Authentication of Non-judicial Records, &c. from other States and Territories. *Horn* v. *Bayard*, 259.

1822, May 7, s. 9. Compensation of Collectors of Customs. *Prieur* v. *Morgan*, 292.

1841, August 19. Bankruptcy. *Diggs* v. *Prieur*, 54. *Alling* v. *Egan*, 244.

II. *Statutes of the State.*

1805, April 10, s. 2. Coroner. *Cruzat* v. *Davis*, 264.

1807, March, 31, s. 10. Authorising Parish Judge to discharge duties of Coroner. *Ib.*

1808, February 10. Coroner. *Ib.*

—— March 2. Relief of insolvent debtors in actual custody. *Gurlie* v. *Flood*, 166.

——————31, s. 6. Attorneys at law. *Chevalon* v. *Schmidt*, 91.

1810, March 24, s. 7. Registry of Notarial Acts. *Prevost* v. *Ellis*, 56.

1814, January 21, s. 6. Office of Coroner. *Cruzat* v. *Davis*, 264.

1817, February 20. Voluntary Surrender of property. *Barkley* v. *His Creditors*, 28. *Reed* v. *Powell*, 98.

1819, March 3. Lease. *State* v. *Judge of City Court, of New Orleans*, 394.

—————— 6. Incorporating Louisiana State Marine and Fire Insurance Company. *Musson* v. *Richardson*, 37.

1823, —— 14. Protest of Bills and Notes. *Follain* v. *Dupré*, 454.

1823, March 27. Attorneys at law. *Chevalon* v. *Schmidt*, 91.
1825, February, 18, s. 6. Incorporating Mississippi Marine and Fire Insurance Company. *Mississippi Marine and Fire Insurance Company* v. *Bank of Louisiana*, 47.
1826, March 22, s. 1. Attorneys at law. *Chevalon* v. *Schmidt*, 91.
—— April 1. Amending art. 305 of Civil Code, as to Family Meetings. *Beale* v. *Walden*, 67.
—— 7, s. 9. Amending Code of Practice as to Sequestration. *Sellick* v. *Kelly*, 145.
—— s. 10. ——, as to Interventions. *Hazard* v. *Agricultural Bank of Mississippi*, 326.
1827, March 1, s. 1. Duration of office of Coroner, &c. *Cruzat* v. *Davis*, 264.
—— 13. Protest of Bills and Notes. *Follain* v. *Dupré*, 454.
1832, April 3. Opening and Improvement of Streets and Public Places in New Orleans. *Hullin* v. *Second Municipality of New Orleans*, 97.
—— ss. 24, 27. Incorporating Union Bank of Louisiana. *Union Bank of Louisiana* v. *Marigny*, 209.
1834, March 10. Assurance of titles of purchasers at Judicial Sales. *Beale* v. *Walden*, 67.
—— Family Meetings. *Ib.*
1835, —— 19. Gaming. *Perry* v. *Commissioners of Clinton and Port Hudson Railroad Company*, 412.
1836, —— 14. —— *Ibid.*
1837, —— 11. Assurance of titles of purchasers at Judicial Sales. *Beale* v. *Walden*, 67.
1838, —— 10, ss. 4, 5. City Court of New Orleans. *State* v. *Judge of City Court of New Orleans*, 394.
——, s. 3. Incorporating Firemen's Insurance Company of New Orleans. *Dixon* v. *Firemen's Insurance Company of New Orleans*, 252.
—— Commissioners to take testimony in other States and Territories. *Dwight* v. *Splane*, 487.
1839, —— 14, ss. 3, 4. Establishing Commercial Court of New Orleans. *Second Municipality of New Orleans* v. *Garland*, 387.
—— 18, s. 2. Bonds of Auctioneers in New Orleans. *State* v. *Beard*, 243.
—— 20, s. 6. Amending Code of Practice as to sequestrations. *Sellick* v. *Kelly*, 145.
——, s. 13. Interrogatories to a third person under a *fi. fa.* *Mandion* v. *Firemen's Insurance Company of New Orleans*, 177. *Raboteau* v. *Valeton*, 218.
—— 20. Amending Charter of Firemen's Insurance Company of New Orleans. *Mandion* v. *Firemen's Insurance Company of New Orleans*, 254.
—— 28, ss. 2, 4. Clinton and Port Hudson Railroad Company. *Perry* v. *Commissioners of Clinton and Port Hudson Railroad Company*, 412.

1840, March 28, s. 2. Abolishing Imprisonment for debt. *Lindley* v. *Hagens*, 203.

———— Amending act of same date abolishing imprisoment for debt. *Ibid.*

———— Jurisdiction of Parish Court of Plaquemines. *State* v. *Parish Judge of Plaquemines*, 285.

1841, February 10, s. 10. Seizure of property by sheriff. *Sheldon* v. *New Orleans Canal and Banking Company*, 181.

——, March 8, ss. 1, 2. Clinton and Port Hudson Railroad Company. *Perry* v. *Commissioners of Clinton and Port Hudson Railroad Company*, 412.

1842, March 14, ss. 28, 29. Liquidation of Banks. *Gaillard* v. *Citizen's Bank of Louisiana*, 168.

———— 26. Clinton and Port Hudson Railroad Company, *Perry* v. *Commissioners of Clinton and Port Hudson Railroad Company*, 412.

1843, April 5, s. 2. Liquidation of Property Banks—Compensation. *Citizen's Bank* v. *Leveé Steam Cotton Press Company*, 286.

1844, February 19. Interest. *West* v. *Plain*, 292.

——, March 25, s. 6. Liquidation of debts of the State. *Perry* v. *Commissioners of Clinton and Port Hudson Railroad Company*, 412.

III. *Statutes of Pennsylvania.*

1834, April 14. Authorising Prothonotaries to sign judgments of Courts of Common Pleas. *Horn* v. *Bayard*, 259.

1842, March 5. Assignments of property by Banks. *Ibid.*

STOCKHOLDER.

1. A stockholder in an insolvent company, a part of whose subscription is unpaid, cannot, by a donation to an insolvent individual, made to get rid of his liability for such unpaid stock, avoid responsibility as a stockholder. A creditor, having a *fieri facias* against the company, may proceed against him in the manner pointed out by the 13th section of the act of 20 March, 1839, and, on proving that the donation was not real, recover judgment for any balance due on the stock.

Mandion v. *Firemen's Insurance Company of New Orleans*, 177.

2. Where stock, on which a balance was still due on account of the original subscription, was transferred to a third person merely to secure a loan, and, on payment of the loan, was re-transferred, such third person will not be liable to creditors of the company for any balance due on the shares, where the transfer, though an absolute one on its face, was not signed and accepted so as to preclude him from showing that it was intended only as a security.

Mandion v. *Firemen's Insurance Company of New Orleans*, 178.

See Firemen's Insurance Company of New Orleans.

SUCCESSIONS.

1. The provision of the Code of 1808 (book 3, title 1, art. 59), that the place where the party died is that in which his succession shall be considered to be

opened, having been repealed by the Code of 1825, which declares (art. 929) that the succession shall be considered as opened in the parish in which the deceased resided, if he had a fixed domicil in the State: *Held*, that the death of the party must be considered as irrevocably vesting the jurisdiction, and that, if the death occurred while the old law was yet in force, the jurisdiction must be determined by it, though no proceedings were had before the promulgation of the new law; but that where a parish has been divided since the death, the jurisdiction will depend upon the fact of the court of the original parish having taken any steps, or assumed jurisdiction in relation to the *mortuaria*, before the division; if it has, its jurisdiction will not be divested by the division; otherwise jurisdiction will belong, under art. 929 of the Civil Code, to the court of the parish which embraces the residence of the deceased.

Beale v. *Walden*, 67.

2. A tutor, as such, without letters of administration, has no authority to administer a succession in which his pupil has an eventual or residuary interest. Such a succession must be administered as an entire thing, for the advantage of the creditors, as well as of the beneficiary heirs entitled to the residue after the payment of the debts. *Ib.*

3. The plaintiff in an action before a District Court assigned his claim therein to several creditors, notifying the defendants; other of his creditors, having obtained judgments against him, levied their executions, in the hands of the defendants, on his interest in the suit. Defendant having died pending the suit, his executors took a rule in the District Court on the assignees and seizing creditors to determine their respective ranks, and for the purpose of distributing among them the amount of the judgment which had been rendered in favor of the plaintiff, which they deposited with the clerk of the District Court: *Held*, that the amount so deposited is a debt in money due by the succession of the defendant to the assignees or seizing creditors; that the Probate Court, in which the succession of the defendant was opened, has exclusive jurisdiction to determine their rights and privileges on the sums due by the estate of the deceased (C. P. 924 § 13, 983); and that the assignees or seizing creditors, though they have submitted below to the jurisdiction of the District Court, may demand, on appeal, the nullity of the judgment of the latter, on the ground of a want of jurisdiction. C. P. 606 § 3, 608. The consent of parties cannot give jurisdiction, when wanting *ratione materiæ*. It can only confer it, where mere personal rights are involved; or where a defendant is sued before another judge than the one of his domicil, and he nevertheless pleads to the merits. C. P. 93. *Fleming* v. *Hiligsberg*, 77.

4. An heir cannot be affected by any claim of an executor, unless personally cited to contest it. *Baldwin* v. *Carleton*, 109.

5. A minor heir is not legally represented by his tutor, on an application for the homologation of the accounts of the executors, where the tutor, as one of the executors, claims, with his co-executor, a sum for commissions on the estate of the deceased. The minor should have been represented by his under-tutor, or the homologation of the accounts of the executors will not form *res judicata* as to him. *Ib.*

6. Executors are jointly and severally responsible for the property committed to their charge. C. C. 1674. *Baldwin* v. *Carleton*, 109.

7. A creditor of a residuary legatee, or devisee, of one whose succession is being administered in another State, cannot attach specific property of the succession, while still in possession and under the control of the executor, and the estate not yet fully administered. The property must be considered as the executor's, for the purposes of his trust. *Thornhill* v. *Christmas*, 201.

8. An executor cannot grant a mortgage on any part of his testator's estate; nor can a Probate Court authorise him to do so, though for the purpose of releasing other property of the succession already mortgaged, with the view to sell it. *Pilié* v. *Citizen's Bank of Louisiana*, 248.

9. The jurisdiction of District Courts extends to the liquidation of claims against successions when pleaded in compensation or reconvention, so far as the conflicting claims extinguish each other; but for any balance ascertained to be due to the defendant he must resort to the court in which the succession was opened, that his rank may be ascertained contradictorily with the other creditors, and his claim placed in its proper place on the *tableau* of distribution. *Thomson* v. *Mylne*, 349.

10. Where a defendant consented to become surety for the plaintiff as administratrix of her husband's succession, on condition that she would leave the whole management of the estate to his co-defendant, he will be responsible, *in solido* with the latter, for any amount that may be due from him to the plaintiff, for her share in the community of *acquets*. *Ball* v. *Hodge*, 390.

11. One who has managed all the business of a succession, under an agreement by which a third person consented to become the surety of the plaintiff as administratrix, on the condition of her trusting the sole management of the estate to the former, will be allowed the usual commissions of an administrator, as an offset, *pro tanto*, against any claim by the plaintiff for a sum coming to her, as the widow of the deceased, from the succession. *Ib.*

12. Payments to the creditors of a succession, made without an order from the Court of Probates, are irregular; but when they exonerate the estate from legal charges, and thereby benefit the heirs, the latter must show that such charges are unjust, unfounded, or excessive, or the payments will be allowed to the party by whom they were made. *Rouly* v. *Bérard*, 478.

13. Parol evidence is inadmissible to prove the appointment of a curator to a succession, unless it be first shown that the record of his appointment has been lost or destroyed. *Ib.*

14. The provisions of arts. 334, 335, 337 of the Civil Code, relate to the sale of property belonging exclusively to minors, not to that of the property of successions, in the hands of an administrator, in which the heirs, whether minors or of age, have but a residuary interest, which can be ascertained only by a full administration. C. C. 1042, 1051. *Richard* v. *Deuel*, 508.

SUMMARY PROCEEDINGS.

Where a purchaser of land at a sheriff's sale does not, at the time, exercise his right of requiring the sheriff to put him in possession, but permits a third person to occupy a part of the premises, he cannot afterwards, by a petition, ad-

dressed to the judge of the court from which the execution was issued in chambers, obtain, in a summary way, an order directing the sheriff to put him possession. *Bigler* v. *Brashear*, 500.

SURETY.

1. Where the evidence induces the belief that the goods, for the price of which defendants are sued, were sold on their credit, they will be bound therefor, though there be no proof of an express guarantee on their part.

Montross v. *Hillman*, 87.

2. Property, provisionally seized, having been released on the execution of a bond with surety, plaintiff obtained judgment, and issued a *fi. fa.*, which was returned "no property found after demand of the parties." On a rule against the surety, to show cause why execution should not be issued against him, the latter introduced a witness who stated that he had notified plaintiff and the sheriff that the property originally seized was within the jurisdiction of the court, and requested him to seize it, informing him where it was. *Held:* That the rule should be made absolute. *Walden* v. *Philips*, 123.

3. A non-resident debtor arrested under the 2d section of the act of 28 March, 1840, having been released on executing a bond, in pursuance of the first section of the amendatory act of the same date, with surety, the condition of which was that he should not depart from the State within three months without leave of the court, on a rule against the bail to show cause why he should not be condemned to pay the amount of the judgment, it was proved that the debtor had left the State within the three months, and that a *fi. fa.* against him had been returned *nulla bona*, but that he was present in court on the trial of the case, and offered to surrender himself in discharge of his bail: *Held*, that the offer to surrender cannot avail the surety, as, since the acts of 1840, no officer had authority to take the principal into custody on such surrender; and that the departure of the latter from the State, within the three months, and the return of a *fi. fa.* against him unsatisfied, fixed the liability of the surety.

Lindley v. *Hagens*, 204.

4. Indulgence granted by the state treasurer to an auctioneer, by taking his notes for a sum due to the State for taxes on sales made by him, will not discharge the sureties on his official bond. The treasurer has authority to collect whatever is due to the State, but not to receive any thing but money in payment of debts due to it, nor to extend the time of payment, or novate any debt.

State v. *Beard*, 243.

5. No recourse can be had on the sureties in an appeal bond, until it be clearly shown by the creditor, that the proceeds of the sale of all the estate and effects of the principal have proved insufficient to discharge his demand. So, where a husband appeals from a judgment against him for a community debt, and dies, leaving children and a widow who accepts the community, the sureties on the appeal bond will be liable only in case the judgment is not satisfied by the widow and heirs so far as they are respectively bound for it, and cannot be satisfied by the sale of all their property, real and personal, liable for its payment. *Saulet* v. *Trepagnier*, 266.

6. Where a defendant consented to become surety for the plaintiff as administratrix of her husband's succession, on condition that she would leave the whole management of the estate to his co-defendant, he will be responsible, *in solido* with the latter, for any amount that may be due from him to the plaintiff, for her share in the community of *acquets*. *Ball* v. *Hodge*, 390.

TREASURER OF THE STATE.

See SURETY, 4.

TUTOR.

See MINOR, 1, 3, 5, 6, 7.

UNION BANK OF LOUISIANA.

See BANK 6.

WARRANTY.

See SALE, III.

END OF VOLUME XI.